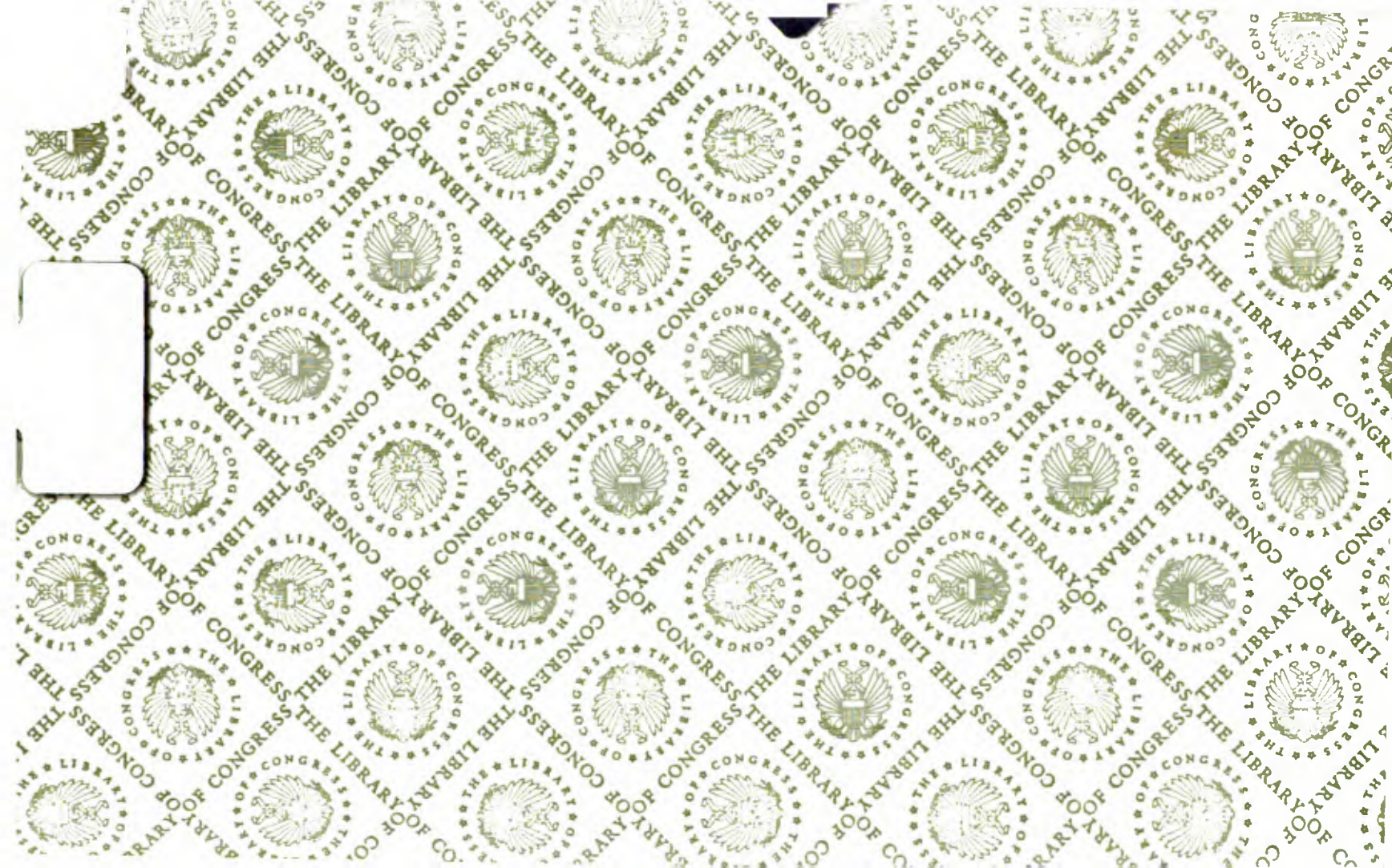
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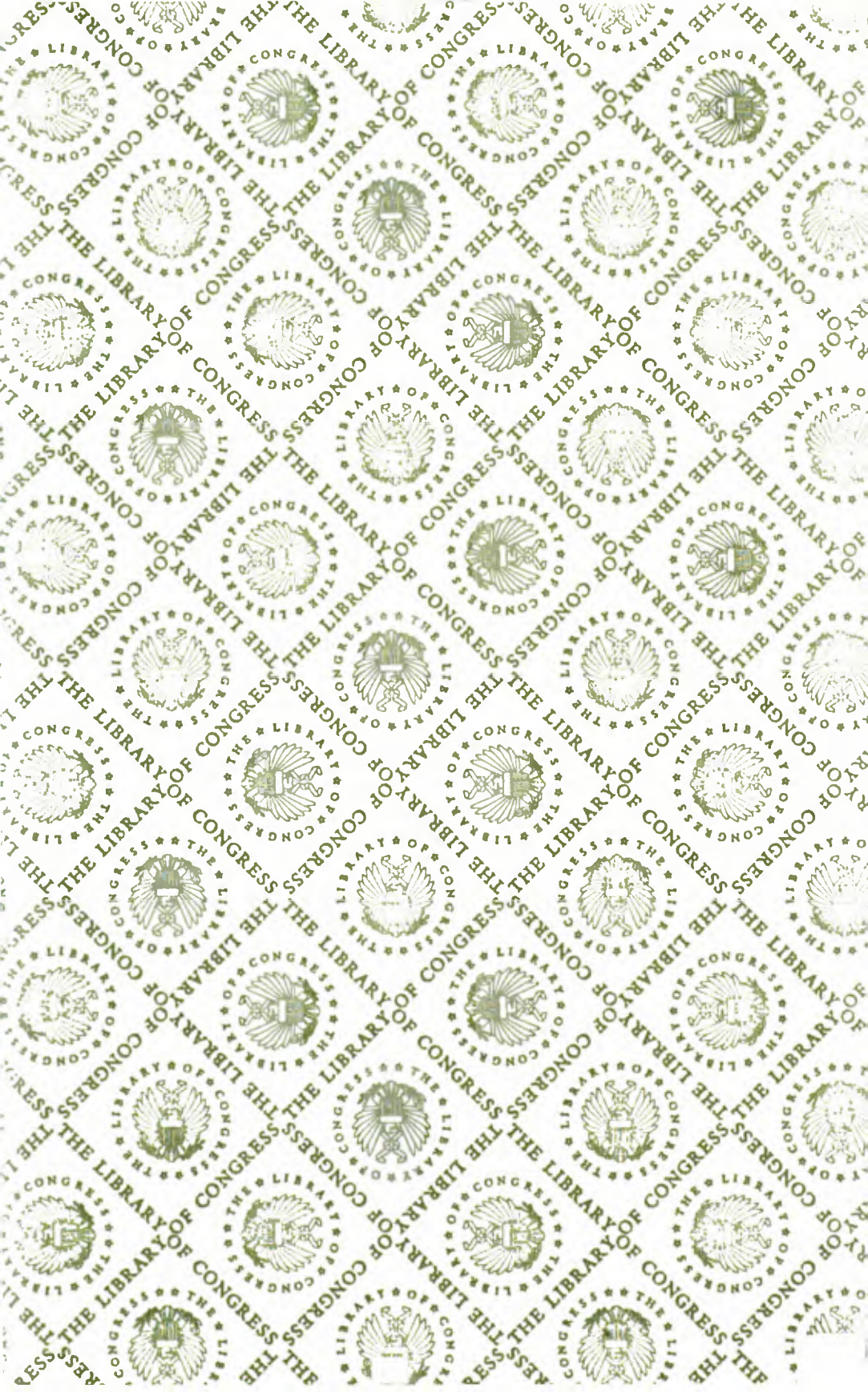
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INTERSTATE CLASS ACTION JURISDICTION ACT OF 1999 AND WORKPLACE GOODS JOB GROWTH AND COMPETITIVENESS ACT OF 1999

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

H.R. 1875 and H.R. 2005

JULY 21, 1999

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INTERSTATE CLASS ACTION JURISDICTION ACT OF 1999 AND WORKPLACE GOODS JOB GROWTH AND COMPETITIVENESS ACT OF 1999

WEDNESDAY, JULY 21, 1999

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to call, at 10 a.m., in Room 2141, Rayburn House Office Building, Hon. Henry J. Hyde [chairman of the committee] presiding.

Present: Representatives Henry J. Hyde, F. James Sensenbrenner, Jr., George W. Gekas, Howard Coble, Bob Goodlatte, Steve Chabot, Asa Hutchinson, Edward A. Pease, Lindsey O. Graham, John Conyers, Jr., Barney Frank, Howard L. Berman, Rick Boucher, Robert C. Scott, Melvin L. Watt, Zoe Lofgren, Sheila Jackson Lee, Martin T. Meehan, William D. Delahunt.

Staff Present: Thomas E. Mooney, Sr., general counsel-chief of staff; Jon Dudas, deputy general counsel-staff director; Diana Schacht, deputy staff director-chief counsel; Daniel M. Freeman, parliamentarian-counsel; Peter Levinson, counsel; Patrick Prisco, assistant to the staff director-deputy general counsel; Becky Ward, office manager; Samuel F. Stratman, communications director; James B. Farr, financial clerk; Shawn Friesen, staff assistant/clerk; Ray Smietanka, chief counsel, Subcommittee on Commercial and Administrative Law; Rick Filkins, counsel, Subcommittee on Crime.

OPENING STATEMENT OF CHAIRMAN HYDE

Mr. HYDE. The committee will come to order. Good morning. I am pleased to convene today's hearing on two pieces of legislation which are intended to inject fairness into our litigation system.

The first, H.R. 1875, the Interstate Class Action Jurisdiction Act of 1999, is the work of two fine members of this committee, Bob Goodlatte and Rick Boucher, and currently is co-sponsored by 37 other members, including myself. It is very similar to legislation this committee favorably reported in the 105th Congress, and I am hopeful we will be able to move it to the President's desk this Congress.

The second bill we will consider this morning is H.R. 2005, the Workplace Goods Job Growth and Competitive Act of 1999. This was introduced by another valued member of our committee, Steve Chabot. The statute of repose formulation that it contains is very

similar to a version that was included in a products liability bill the President indicated he would support in the 105th Congress. I hope the administration will continue to work with us on the Chabot bill.

[The bills, H.R. 1875 and H.R. 2005, follow:]

106TH CONGRESS
1ST SESSION

H. R. 1875

To amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions.

IN THE HOUSE OF REPRESENTATIVES

MAY 19, 1999

Mr. GOODLATTE (for himself, Mr. BOUCHER, Mr. BRYANT, Mr. MORAN of Virginia, Mr. DELAY, Mr. ARMEY, Mr. HYDE, Mr. SENSENBRENNER, Mr. MCCOLLUM, Mr. GEKAS, Mr. SMITH of Texas, Mr. GALLEGLY, Mr. CANADY of Florida, Mr. CHABOT, Mr. BARR of Georgia, Mr. HUTCHINSON, Mr. CANNON, Mr. ROGAN, Mrs. BONO, Mr. BLILEY, Mr. COX, Mr. CRAMER, Mr. DREIER, Mr. GOODE, Mr. HOLDEN, Mr. JOHN, Mrs. JOHNSON of Connecticut, Mr. LINDER, Mr. OXLEY, Mr. STENHOLM, Mr. SUNUNU, and Mr. UPTON) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND REFERENCE.

(a) SHORT TITLE.—This Act may be cited as the "Interstate Class Action Jurisdiction Act of 1999".

(b) REFERENCE.—Whenever in this Act reference is made to an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 28, United States Code.

SEC. 2. FINDINGS.

The Congress finds that—

(1) as recently noted by the United States Court of Appeals for the Third Circuit, interstate class actions are "the paradigm for Federal diversity jurisdiction because, in a constitutional sense, they implicate interstate commerce, invite discrimination by a local State, and tend to attract bias against business enterprises";

(2) most such cases, however, fall outside the scope of current Federal diversity jurisdiction statutes;

(3) that exclusion is an unintended technicality, inasmuch as those statutes were enacted by Congress before the rise of the modern class action and therefore without recognition that interstate class actions typically are substantial controversies of the type for which diversity jurisdiction was designed;

(4) Congress is constitutionally empowered to amend the current Federal diversity jurisdiction statutes to permit most interstate class actions to be brought in or removed to Federal district courts; and

(5) in order to ensure that interstate class actions are adjudicated in a fair, consistent, and efficient manner and to correct the unintended, technical exclusion of such cases from the scope of Federal diversity jurisdiction, it is appropriate for Congress to amend the Federal diversity jurisdiction and related statutes to allow more interstate class actions to be brought in or removed to Federal court.

SEC. 3. JURISDICTION OF DISTRICT COURTS.

(a) EXPANSION OF FEDERAL JURISDICTION.—Section 1332 is amended by redesignating subsections (b), (c), and (d) as subsections (c), (d), and (e), respectively, and by inserting after subsection (a) the following:

"(b)(1) The district courts shall have original jurisdiction of any civil action which is brought as a class action and in which—

"(A) any member of a proposed plaintiff class is a citizen of a State different from any defendant;

"(B) any member of a proposed plaintiff class is a foreign state and any defendant is a citizen of a State; or

"(C) any member of a proposed plaintiff class is a citizen of a State and any defendant is a citizen or subject of a foreign state."

As used in this paragraph, the term 'foreign state' has the meaning given that term in section 1603(a).

"(2)(A) The district courts shall not exercise jurisdiction over a civil action described in paragraph (1) if the action is—

"(i) an intrastate case,

"(ii) a limited scope case, or

"(iii) a State action case.

For purposes of this subparagraph, the term 'intrastate case' means a class action in which the record indicates that the claims asserted therein will be governed primarily by the laws of the State in which the action was originally filed and the substantial majority of the members of all proposed plaintiff classes are citizens of that State of which the primary defendants are also citizens. For purposes of this subparagraph, the term 'limited scope case' means a class action in which the record indicates that all matters in controversy asserted by all members of all proposed plaintiff classes do not in the aggregate exceed the sum or value of $1,000,000, exclusive of interest and costs, or a class action in which the number of members of all proposed plaintiff classes in the aggregate is less than 100. For purposes of this subparagraph, the term 'State action case' means a class action in which the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.

"(3)(A) Paragraph (1) shall not apply to any claim concerning a covered security as that term is defined in section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934.".

(b) CONFORMING AMENDMENT.—Section 1332(c) (as redesignated by this section) is amended by inserting after "Federal courts" the following: "pursuant to subsection (a) of this section".

(c) DETERMINATION OF DIVERSITY.—Section 1332, as amended by this section, is further amended by adding at the end the following:

"(f) For purposes of subsection (b), a member of a proposed class shall be deemed to be a citizen of a State different from a defendant corporation only if that member is a citizen of a State different from all States of which the defendant corporation is deemed a citizen.".

SEC. 4. REMOVAL OF CLASS ACTIONS.

(a) IN GENERAL.—Chapter 89 is amended by adding after section 1452 the following:

"§ 1453. Removal of class actions

"(a) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with this chapter, except that such action may be removed—

"(1) by any defendant without the consent of all defendants; or

"(2) by any plaintiff class member who is not a named or representative class member of the action for which removal is sought, without the consent of all members of such class.

"(b) WHEN REMOVABLE.—This section shall apply to any class action before or after the entry of any order certifying a class.

"(c) PROCEDURE FOR REMOVAL.—The provisions of section 1446(a) relating to a defendant removing a case shall apply to a plaintiff removing a case under this section. With respect to the application of subsection (b) of such section, the requirement relating to the 30-day filing period shall be met if a plaintiff class member who is not a named or representative class member of the action for which removal is sought files notice of removal no later than 30 days after receipt by such class member, through service or otherwise, of the initial written notice of the class action provided at the court's direction.

"(d) EXCEPTION.—This section shall not apply to any claim concerning a covered security as that term is defined in section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934.".

(b) REMOVAL LIMITATIONS.—Section 1446(b) is amended in the second sentence—

(1) by inserting ", by exercising due diligence," after "ascertained"; and

(2) by inserting "(a)" after "section 1332."

(c) TECHNICAL AND CONFORMING AMENDMENTS.—The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following:

"1453. Removal of class actions.".

(d) APPLICATION OF SUBSTANTIVE STATE LAW.—Nothing in this section or the amendments made by this section shall alter the substantive law applicable to an action to which the amendments made by section 2 of this Act apply.

(e) PROCEDURE AFTER REMOVAL.—Section 1447 is amended by adding at the end the following new subsection:

"(f) If, after removal, the court determines that no aspect of an action that is subject to its jurisdiction solely under the provisions of section 1332(b) may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, it shall dismiss the action. An action dismissed pursuant to this subsection may be filed again in a State court, but any such refiled action may be removed again if it is an action of which the district courts of the United States have original jurisdiction. In any action dismissed pursuant to this subsection, the period of limitations for any claim that was asserted in the action on behalf of any named or unnamed member of any proposed class shall be deemed tolled to the full extent provided under Federal law.".

SEC. 5. APPLICABILITY.

The amendments made by this Act shall apply to any action commenced on or after the date of the enactment of this Act.

○

106TH CONGRESS
1ST SESSION

H. R. 2005

To establish a statute of repose for durable goods used in a trade or business.

IN THE HOUSE OF REPRESENTATIVES

JUNE 7, 1999

Mr. CHABOT (for himself, Ms. SLAUGHTER, and Mr. SHIMKUS) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To establish a statute of repose for durable goods used in a trade or business.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Workplace Goods Job Growth and Competitiveness Act of 1999".

SEC. 2. STATUTE OF REPOSE FOR DURABLE GOODS USED IN A TRADE OR BUSINESS.

(a) IN GENERAL.—Except as otherwise provided in this Act—

(1) no civil action for damage to property arising out of an accident involving a durable good may be filed against the manufacturer or seller of the durable good more than 18 years after the durable good was delivered to its first purchaser or lessee; and

(2) no civil action for damages for death or personal injury arising out of an accident involving a durable good may be filed against the manufacturer or seller of the durable good more than 18 years after the durable good was delivered to its first purchaser or lessee if—

(A) the claimant has received or is eligible to receive worker compensation; and

(B) the injury does not involve a toxic harm.

(b) EXCEPTIONS.—

(1) IN GENERAL.—A motor vehicle, vessel, aircraft, or train, that is used primarily to transport passengers for hire shall not be subject to this Act.

(2) CERTAIN EXPRESS WARRANTIES.—This Act does not bar a civil action against a defendant who made an express warranty in writing as to the safety or life expectancy of a specific product which was longer than 18 years, except that this Act shall apply at the expiration of that warranty.

(3) AVIATION LIMITATIONS PERIOD.—This Act does not affect the limitations period established by the General Aviation Revitalization Act of 1994 (49 U.S.C. 40101 note).

(c) EFFECT ON STATE LAW; PREEMPTION.—Nothing in this Act shall be construed to preempt or supersede any State law establishing a statute of repose applicable to products other than durable goods or governing a claim that is not specifically covered by this Act. Any claim that is not specifically covered by this Act or involves a product not subject to this Act shall be governed by applicable State law.

(d) TRANSITIONAL PROVISION RELATING TO EXTENSION OF REPOSE PERIOD.—To the extent that this Act shortens the period during which a civil action could be otherwise brought pursuant to another provision of law, the claimant may, notwithstanding this Act, bring the action not later than 1 year after the date of the enactment of this Act.

SEC. 3. DEFINITIONS.

In this Act:

(1) CLAIMANT.—The term "claimant" means any person who brings an action covered by this Act and any person on whose behalf such an action is brought. If such an action is brought through or on behalf of an estate, the term includes the claimant's decedent. If such an action is brought through or on behalf of a minor or incompetent, the term includes the claimant's legal guardian.

(2) DURABLE GOOD.—The term "durable good" means any product, or any component of any such product, which—

(A)(i) has a normal life expectancy of 3 or more years; or

(ii) is of a character subject to allowance for depreciation under the Internal Revenue Code of 1986; and

(B) is—

(i) used in a trade or business;

(ii) held for the production of income; or

(iii) sold or donated to a governmental or private entity for the production of goods, training, demonstration, or any other similar purpose.

(3) STATE.—The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the Virgin Islands, Guam, American Samoa, and any other territory or possession of the United States or any political subdivision of any of the foregoing.

SEC. 4. EFFECTIVE DATE; APPLICATION OF ACT.

(a) EFFECTIVE DATE.—Except as provided in subsection (b), this Act shall take effect on the date of the enactment of this Act without regard to whether the damage to property or death or personal injury at issue occurred before such date of enactment.

(b) APPLICATION OF ACT.—This Act shall not apply with respect to civil actions commenced before the date of the enactment of this Act.

○

Mr. HYDE. I would like to give the sponsors of these bills an opportunity to comment on them before we begin with testimony from our first panel.

I will also recognize the Ranking Minority Member, Mr. Conyers, and the Ranking Member of the Courts and Intellectual Property Subcommittee, Mr. Berman. However, I think it would be most productive if we recognize the three sponsors that are here for statements, and then we will go to Mr. Conyers and Mr. Berman.

So, Mr. Goodlatte, you are recognized for an opening statement.

Mr. GOODLATTE. Thank you, Mr. Chairman. Mr. Chairman, I have a request from Congressman Castle, who is not a member of the committee, to submit a statement on his behalf to be made a part of the record.

Mr. HYDE. Without objection, so ordered.

[The prepared statement of Mr. Castle follows:]

PREPARED STATEMENT OF HON. MICHAEL N. CASTLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF DELAWARE

Mr. Chairman, members of the Judiciary Committee, I appreciate this opportunity to submit testimony in support of including a corporate governance provision in H.R. 1875, the Interstate Class Action Jurisdiction Act of 1999.

H.R. 1875 is intended to address the abusive trend toward filing in state courts of mass tort and consumer class actions. I support the goals of this statute—giving both defendants and plaintiff class members who did not initiate the suit the choice of having it heard in our federal courts.

The broad wording of H.R. 1875, however, would bring within its sweep a type of class action that state courts have handled effectively, as Congress has recognized on several occasions in recent years. I am speaking of corporate governance litigation, by which I mean litigation based on (a) state statutory law regulating the organization and governance of corporations and other business entities such as partnerships, limited partnerships, LLCs and business trusts; (b) state common law of the duties owed between and among owners and managers of business enterprises, and (c) the rights arising out of the terms of the securities issued by business enterprises.

The proposed corporate governance provision, a copy of which I have attached to this testimony as Exhibit A, would exempt corporate governance litigation from the sweep of H.R. 1875. This corporate governance provision deserves this Committee's and the Congress's support.

The United States Supreme Court has observed that "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations. . . ." *CTS Corp.* v. *Dynamics Corp. of America*, 481 U.S. 69, 89, 107 S.Ct. 1637, 1649 (1987). One manifestation of this principle is that corporate governance litigation has traditionally been conducted principally in state courts, particularly the Delaware Court of Chancery, a part of my State's judicial system which has achieved a national reputation for efficiency and excellence of its processes and decisions. As Chief Justice William H. Rehnquist has observed:

> "The Delaware state court system has established its national preeminence in the field of corporation law due in large measure to its Court of Chancery."

Rehnquist, "The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice," 48 Bus. Law. 351, 354 (Nov. 1992)(hereinafter "Rehnquist").

Many corporate governance litigations proceed as class actions for sound reasons. The corporate conduct at issue generally affects a large group of security owners identically and any remedy obtained necessarily applies to all affected security owners. There is inherent judicial efficiency in having these types of cases proceed as class actions. In publicly-held companies, investors and directors are geographically dispersed. Thus, in corporate class action litigations, there would always be sufficient diversity of citizenship to bring the cases into federal court under H.R. 1875.

When Congress considered the Securities Litigation Uniform Standards Act of 1998 (H.R. 1689 and S.1260 in the 105th Congress), the Securities and Exchange Commission ("SEC") testified in favor of a carve out of fiduciary duty and corporate law based class actions from the scope of that legislation. The SEC's testimony there applies to H.R. 1875 with equal force:

> Many state courts, particularly those in Delaware, have developed expertise and a coherent body of case law which provides guidance to companies and lends predictability to corporate transactions. In addition, the Delaware courts, in

particular, are known for their ability to resolve such disputes expeditiously—in days or weeks rather than months or years. Delay in resolving a dispute over a merger or acquisition could jeopardize completion of a multibillion dollar transaction. Broad preemption would diminish the value of this body of precedent and those specialized courts as a means of resolving corporate disputes.

"Securities Litigation Uniform Standards Act of 1997, Hearings on S.1260 Before the Subcommittee on Securities, Senate Committee on Banking, Housing and Urban Affairs," 105th Cong. (Oct. 29, 1997)(Statement of Chairman Arthur Levitt and Comm'r Isaac C. Hunt, Jr. of the Securities and Exchange Commission.)

State courts offer the following advantages for corporate litigation:

1. jurists deeply familiar with a well-developed body of case law;
2. courts attuned to the pressing business need for resolving these cases quickly, and willing and able to adjust schedules to do so, without the burden of criminal trials, overloaded civil dockets and bankruptcy matters which importantly require a large degree of attention from federal judges; and
3. the predictability of and litigants' confidence in the decisions of a court of equity or statutory business court where the judge is the sole decision maker, rather than the federal courts, which under Constitutional provisions necessarily must submit some matters to the vagaries of jury decisions. *See generally*, Rehnquist, 48 Bus. Law at 354.

These advantages particularly exist in the Delaware Court of Chancery, and in states such as New Jersey, that have maintained a chancery division in the general jurisdiction trial court. Recognizing the importance of these forum qualities to business litigants, other states in recent years have sought to emulate Delaware by creating courts with jurisdiction designed to provide a forum for the resolution of business disputes with expertise and efficiency. Prominent among these are New York and Pennsylvania. Creation of such courts by these states reflects a judgment that the coherent articulation and development of state law governing business entities is a worthwhile goal best addressed by the existence of a forum with subject matter expertise in the area.

Allowing removal of state law based business entity internal governance actions to federal court would disrupt over a century of logical common law development of a coherent and balanced body of state statutory law and fiduciary principles governing corporations and other business entities. To be sure, the federal jurists presiding over these cases would decide such matters in the professional manner they bring to other cases. Allowing removal, however, would have the effect of fracturing the development of the law by taking it from a small number of highly specialized and expert jurists, conversant with the history and current trends in the development of that law, and consigning it instead to busy federal judges who necessarily must have a broader legal focus, and to federal juries across the country.

Congress has already recognized the desirability of leaving corporate governance litigation in state courts by including a similar provision in the Uniform Standards Act. See Public Law 105–353, 112 Stat. 3227, amendments to Section 16(d)(1) of the Securities Act of 1933, now 15

U.S.C. § 77p(d)(1), and to Section 28(f)(3)(A) of the Securities Exchange Act of 1934, now 15 U.S.C. § 78bb(f)(3)(A). That provision came to the Congress with the full support of the sponsors of the Uniform Standards Act and the business community. The corporate governance provision for H.R. 1875 will have similar support and deserves the same recognition Congress gave the comparable provision in the Uniform Standards Act.

A few comments about the language of the proposed corporate governance provision are in order. Section 1 uses the phrase "the internal affairs or governance of a corporation or other form of entity or business association. . . ." This phrase makes clear that the provision refers to the internal affairs doctrine, a well understood concept in corporate law.

The U.S. Supreme Court has defined internal affairs as "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders. . . ." *Edgar* v. *Mite Corp.*, 457 U.S. 624, 645; 102 S.Ct. 2642, 2629 (1982). The Delaware Supreme Court articulated an even more particular definition in *McDermott, Inc.* v. *Lewis*, 531 A.2d 206, 214–15 (Del. 1987):

> Internal corporate affairs involve those matters which are peculiar to the relationships among or between the corporation and its current officers, directors and shareholders. . . . It is essential to distinguish between acts which can be performed by both corporations and individuals, and those activities which are peculiar to the corporate entity.

> Corporations and individuals alike enter into contracts, commit torts and deal in personal and real property. Choice of law decisions relating to such corporate activities are usually determined after consideration of the facts of each transaction. . . . In such cases the choice of law determination often turns on whether the corporation had sufficient contacts with the forum state, in relation to the act or transaction in question, to satisfy the constitutional requirements of due process. The internal affairs doctrine has no applicability in these situations. Rather, this doctrine governs the choice of law determinations involving matters peculiar to corporations, that is, those activities concerning the relationships inter se of the corporation, its directors, officers and shareholders. [Emphasis in original.]

See also Draper v. *Paul N. Gardner Defined Plan Trust*, 625 A.2d 859, 865–66 (Del. 1993). As these decisions show, "internal affairs" is a term well understood by corporate practitioners and courts experienced in the application and analysis of corporate law.

The phrase "other form of entity or business association" is included because of the increasing popularity of forms of business entity other than a corporation—business entities such as limited liability companies, limited liability partnerships, business trusts and limited partnerships. Courts have carried over the internal affairs doctrine to these forms of business entity as well.

Section 2 is included to cover disputes over the meaning of terms of a security. Generally, the terms of a security are spelled out in some formative document of the business entity, such as a certificate of incorporation or a certificate of designations. The terms of a security are deemed to be contracts between a corporation and the holders of that security. See, for example, *Kaiser Aluminum Corporation* v. *Matheson*, 681 A.2d 392 (De. 1996). The meaning of the terms of the security and how they apply in a given set of circumstances can be a subject of legitimate dispute between the holders of the security and the corporation. See, for example, *Elliott Associates, L.P.* v. *Avatex Corporation*, 715 A.2d 843 (De. 1998). Many such disputes are efficiently and appropriately litigated as class actions.

The reference in Section 2 to the Securities Act of 1933 is only for definitional purposes. Rather than try to write a new definition for the concept of a security, the proposed corporate governance provision simply imports the definition contained in the Securities Act. The reference to the rules and regulations adopted under the Securities Act is simply to make clear that the definition in this provision is the definition from the Securities Act as interpreted by the rules and regulations adopted under it.

In summary, the inclusion of the corporate governance provision in Sections 3 and 4 of H.R. 1875 would be consistent with the purposes of that legislation, and a continuation of sound policy judgments that leave corporate governance litigation in courts best equipped to handle it, as recently endorsed by Congress by the inclusion of a similar provision in the Uniform Standards Act. Our national system of governance for business entities has been premised on state creation of business entities and state law regulation of the relations between and among owners and managers of business entities. This system has served our economy well. Neither the business nor investment community has sought to change it. We should not disturb it. Rather, we should leave it in place by including the corporate governance provision in H.R. 1875.

CORPORATE GOVERNANCE PROVISION

This section shall not apply to any class action, regardless of the forum in which any such action may be filed, solely involving any claim relating to—

(1) the internal affairs or governance of a corporation or other form of entity or business association arising under or by virtue of the laws of the State in which such corporation, entity, or business association is incorporated or organized; or

(2) the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any securities (as defined under section 2(a)(1) of the Securities Act of 1933 or the rules and regulations adopted under such Act).

Mr. GOODLATTE. Mr. Chairman, I would like to thank you for holding today's important hearing on the Interstate Class Action Jurisdiction Act, legislation I have introduced along with fellow committee member, Congressman Boucher, to ensure that truly

interstate class actions are heard in Federal court. This much needed bipartisan legislation corrects a serious flaw in our Federal jurisdiction statutes. At present, those statutes forbid our Federal courts from hearing most interstate class actions.

The class action device is a necessary and important part of our legal system. It promotes efficiency by allowing plaintiffs with similar claims to adjudicate their cases in one proceeding. It allows claims to be heard in cases where there are small harms to a large number of people which would otherwise go unaddressed because the cost to the individual suing would far exceed any possible benefit to the individual. However, class actions have been used with an increasing frequency, and in ways that do not promote the interest they were intended to serve.

In recent years, State courts have been flooded with class actions. As a result of the adoption of different class action certification standards in the various States, the same class might be certifiable in one State and not another, or certifiable in State court but not in Federal court. This creates the potential for abuse of the class action device, particularly when the case involves parties from multiple States or requires the application of the laws of many States.

The existence of State courts, which broadly apply class action rules, encourages plaintiffs to "forum shop" for the court which is most likely to certify a purported class. In addition to forum shopping, parties frequently exploit major loopholes in Federal jurisdiction statutes to block the removal of class actions that belong in Federal court. For example, plaintiff's counsel may name parties that are not really relevant to the class claims, in an effort to destroy diversity. In other cases, counsel may waive Federal law claims or "shave" the amount of damages claimed to ensure that the action will remain in State court.

Another problem created by the ability of State courts to certify class actions which adjudicate the rights of citizens of many States is that often more than one case involving the same class is certified at the same time. In the Federal court system, those cases involving common questions of fact may be transferred to one district for coordinated or consolidated pretrial proceedings.

When these class actions are pending in State courts, however, there is no corresponding mechanism for consolidating the competing suits. Instead, a settlement or judgment in any of the cases makes the other class actions moot. This creates an incentive for each class counsel to obtain a quick settlement of the case, and an opportunity for the defendant to "play" the various class counsel against each other and drive the settlement value down. The loser in this system is the class member whose claim is extinguished by the settlement, at the expense of counsel seeking to be the one entitled to recovery of fees.

Our bill is designed to prevent these abuses by allowing large, interstate class action cases to be heard in Federal court. It would expand the statutory diversity jurisdiction of the Federal courts to allow class action cases involving minimal diversity—that is, when any plaintiff and any defendant are citizens of different States—to be brought in or removed to Federal court.

Article III of the Constitution empowers Congress to establish Federal jurisdiction over diversity cases, cases between citizens of different States. The grant of Federal diversity jurisdiction was premised on concerns that State courts might discriminate against out-of-State defendants. In a class action, only the citizenship of a named plaintiff is considered for determining diversity, which means that Federal diversity jurisdiction will not exist if the named plaintiff is a citizen of the same State as the defendant, regardless of the citizenship of the rest of the class.

Congress also imposes a monetary threshold—now $75,000—for Federal diversity claims. However, the amount in controversy requirement is satisfied in a class action only if all of the class members are seeking damages in excess of the statutory minimum.

These jurisdictional statutes were originally enacted years ago, well before the modern class action arose, and they now lead to perverse results. For example, under current law, a citizen of one State may bring in Federal court a simple $75,001 slip-and-fall claim against a party from another State, but if a class of 25 million product-owners living in all 50 States brings claims collectively worth $15 billion against the manufacturer, the lawsuit usually must be heard in State court because it does not meet the minimum amount per plaintiff. This result is certainly not what the Framers had in mind when they established Federal diversity jurisdiction.

Our bill offers a solution by making it easier for plaintiff class members and defendants to remove class actions to Federal court where cases involving multiple State laws are more appropriately heard. Under our bill, if a removed class action is found not to meet the requirements for proceeding on a class basis, the Federal court would dismiss the action, without prejudice, and the action would be refiled in State court. This legislation does not limit the ability of anyone to file a class action lawsuit. It does not change anybody's rights to recovery. Our bill specifically provides that it will not alter the substantive law governing any claims as to which jurisdiction is conferred. Our legislation merely closes the loophole allowing Federal courts to hear big lawsuits involving truly interstate issues, while ensuring that purely local controversies remain in State courts.

This is exactly what the Framers of the Constitution had in mind when they established Federal diversity jurisdiction. I urge my colleagues to support this bipartisan legislation. I look forward to hearing from the witnesses who will testify before us today.

[The prepared statement of Mr. Goodlatte follows:]

PREPARED STATEMENT OF HON. BOB GOODLATTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. Chairman, I would like to thank you for holding today's important hearing on the Interstate Class Action Jurisdiction Act—legislation I have introduced along with fellow committee member, Rick Boucher—to ensure that truly interstate class actions are heard in federal court.

This much-needed bipartisan legislation corrects a serious flaw in our federal jurisdiction statutes. At present, those statutes forbid our federal courts from hearing most interstate class actions—the lawsuits that involve more money and touch more Americans than virtually any other litigation pending in our legal system.

The class action device is a necessary and important part of our legal system. It promotes efficiency by allowing plaintiffs with similar claims to adjudicate their

cases in one proceeding. It also allows claims to be heard in cases where there are small harms to a large number of people, which would otherwise go unaddressed because the cost to the individuals suing would far exceed any possible benefit to the individual. However, class actions have been used with an increasing frequency and in ways that do not promote the interests they were intended to serve.

In recent years, state courts have been flooded with class actions. As a result of the adoption of different class action certification standards in the various states, the same class might be certifiable in one state and not another, or certifiable in state court but not in federal court. This creates the potential for abuse of the class action device, particularly when the case involves parties from multiple states or requires the application of the laws of many states.

For example, some state courts routinely certify classes before the defendant is even served with a complaint and given a chance to defend itself. Other state courts employ very lax class certification criteria, rendering virtually any controversy subject to class action treatment. There are instances where a state court, in order to certify a class, has determined that the law of that state applies to all claims, including those of purported class members who live in other jurisdictions. This has the effect of making the law of that state applicable nationwide.

The existence of state courts which broadly apply class certification rules encourages plaintiffs to forum shop for the court which is most likely to certify a purported class. In addition to forum-shopping, parties frequently exploit major loopholes in federal jurisdiction statutes to block the removal of class actions that belong in federal court. For example, plaintiffs' counsel may name parties that are not really relevant to the class claims in an effort to destroy diversity. In other cases, counsel may waive federal law claims or shave the amount of damages claimed to ensure that the action will remain in federal court.

Another problem created by the ability of state courts to certify class actions which adjudicate the rights of citizens of many states is that often times more than one case involving the same class is certified at the same time. In the federal court system, those cases involving common questions of fact may be transferred to one district for coordinated or consolidated pretrial proceedings.

When these class actions are pending in state courts, however, there is no corresponding mechanism for consolidating the competing suits. Instead, a settlement or judgment in any of the cases makes the other class actions moot. This creates an incentive for each class counsel to obtain a quick settlement of the case, and an opportunity for the defendant to play the various class counsel against each other and drive the settlement value down. The loser in this system is the class member whose claim is extinguished by the settlement, at the expense of counsel seeking to be the one entitled to recovery of fees.

Our bill is designed to prevent these abuses by allowing large interstate class action cases to be heard in federal court. It would expand the statutory diversity jurisdiction of the federal courts to allow class action cases involving minimal diversity—that is, when any plaintiff and any defendant are citizens of different states—to be brought in or removed to federal court.

Article III of the Constitution empowers Congress to establish federal jurisdiction over diversity cases—cases "between citizens of different States." The grant of federal diversity jurisdiction was premised on concerns that state courts might discriminate against out of state defendants. In a class action, only the citizenship of the named plaintiffs is considered for determining diversity, which means that federal diversity jurisdiction will not exist if the named plaintiff is a citizen of the same state as the defendant, regardless of the citizenship of the rest of the class. Congress also imposes a monetary threshold—now $75,000—for federal diversity claims. However, the amount in controversy requirement is satisfied in a class action only if all of the class members are seeking damages in excess of the statutory minimum.

These jurisdictional statutes were originally enacted years ago, well before the modern class action arose, and they now lead to perverse results. For example, under current law, a citizen of one state may bring in federal court a simple $75,001 slip-and-fall claim against a party from another state. But if a class of 25 million product owners living in all 50 states brings claims collectively worth $15 billion against the manufacturer, the lawsuit usually must be heard in state court.

This result is certainly not what the framers had in mind when they established federal diversity jurisdiction. Our bill offers a solution by making it easier for plaintiff class members and defendants to remove class actions to federal court, where cases involving multiple state laws are more appropriately heard. Under our bill, if a removed class action is found not to meet the requirements for proceeding on a class basis, the federal court would dismiss the action without prejudice and the action could be refiled in state court.

This legislation does not limit the ability of anyone to file a class action lawsuit. It does not change anybody's rights to recovery. Our bill specifically provides that it will not alter the substantive law governing any claims as to which jurisdiction is conferred. Our legislation merely closes the loophole, allowing federal courts to hear big lawsuits involving truly interstate issues, while ensuring that purely local controversies remain in state courts. This is exactly what the framers of the Constitution had in mind when they established federal diversity jurisdiction.

I urge each of my colleagues to support this bipartisan legislation, and I look forward to hearing from the witnesses who will testify before us today.

Mr. HYDE. Thank you. Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman. I want to commend you for scheduling this morning's hearing on legislation that I am pleased to offer along with my Virginia colleague, Mr. Goodlatte, for the purpose of making a much needed reform in an area that has been subjected to substantial abuse.

Increasingly, cases that are truly national in scope are being filed as State class actions. In fact, a report that was prepared for the Federal Judicial Conferences Advisory Committee on Civil Rules indicates that over the past decade there has been an increase of approximately 1,000 percent in class action filings, the predominant number of which have been in State courts.

A range of problems attends this growing practice. Some States have lax rules for class certifications, an "almost anything goes" approach, rendering virtually any controversy subject to class action treatment. Some State courts routinely engage in a practice that can be described as "drive-by class certifications," in which the decision to certify the class is made before the defendant is even served with the complaint and given an opportunity to contest certification.

In such an environment, defendants, and even plaintiff class members, are denied their normal rights as there is a rush to certify classes and to settle cases. For example, in order to prevent removal of cases to Federal courts, the amount in controversy, the amount that is actually sued for, is sometimes artificially kept below $75,000, even though the plaintiffs could make a claim that they are entitled to more, but less is sued for just to prevent removal of the case to Federal court. In the same vein, class action complaints will, in some instances, not raise Federal causes of action that could legitimately be raised, also for the purpose of preventing removal of the case to Federal court.

These practices are clearly not in the interest of the plaintiffs on whose behalf the class action is being filed, and neither are the quick settlements that often follow that yield large fees for the lawyers and often negligible returns for the plaintiffs. Frequently, plaintiffs receive coupons while the lawyers receive millions.

In one notorious case, the lawyers for a class made $8.5 million while some class members actually had a debit of $91 to their mortgage escrow accounts. So, the plaintiffs were worse off than before the action had been filed.

Another major problem arises from the inability of States to consolidate class action proceedings that are filed in more than one State that involve the same cause of action and involve the same class members. Frequently, these parallel cases proceed simultaneously in several States, to the disadvantage of all parties concerned. This circumstance even leads to competition among State

courts to control the litigation and achieve a settlement first, whatever the cost of that settlement to the plaintiffs on whose behalf the case has been filed.

In the Federal courts, of course, multi-district litigation can be consolidated before a single Federal court, eliminating that range of problems.

Our legislation seeks to address these concerns by permitting cases that are truly national in scope to be removed to the Federal courts, even if the diversity requirements are not strictly met. Today, the target defendant is almost always a large out-of-State corporation.

To prevent removal under current rules, an in-State defendant, such as a retailer, is often joined as a party defendant, not because anybody expects recovery from that defendant but simply because his presence in the case as a defendant completes diversity and therefore prevents removal of the case to the Federal court. Our legislation would prevent removal in that instance, if the center of gravity of the case is truly national.

As we drafted the legislation, we clearly provided that cases that are local in nature will not be entertained in the Federal courts unless the traditional diversity rules are, in fact, met. If the defendant and the substantial majority of the plaintiffs are in-State parties and if the law of that State would apply, then the Federal judge would be required to remand the case to the State court.

We have also assured that if a case that is national in scope is removed to the Federal court and the Federal judge decides that it does not meet the Federal rules for class certification, he will then dismiss the case without prejudice. The statute of limitations will be tolled during the time in which the case was pending, and the plaintiffs will then be free to refile as individuals, to refile as a State class action assuming that they adjust the case so as to make it local in nature, or to refile as a Federal class action if adjustments are made to conform the case to the Federal class certification rules. In other words, the plaintiffs will be free to pursue their individual cases, or to pursue subsequent State or Federal class actions, if they so desire, and the statute of limitations will be told for the time that the original case was pending.

This is truly a modest reform, and it addresses a genuine problem by permitting the removal of truly national class action cases to the Federal courts where they belong. Those Federal courts are better equipped to deal with these cases, and they are better situated to assure that the rights of both plaintiffs and defendants are protected.

Mr. Chairman, I want to say a word of welcome to our witnesses this morning, and thank them for contributing their scholarship to this debate, and I thank you once again for scheduling the hearing.

Mr. HYDE. The ranking member of the committee, John Conyers, of Michigan.

Mr. CONYERS. Members of the committee, I think an agenda is being revealed here this morning, it's called the "bailing out of corporate defendants," with little concern for working Americans or States' rights. It is really time that we refocus our energy on protecting the victims, and not the wrongdoers, and I am afraid that

we are going down a slippery slope. I am glad it is being put in the context of "these are minor changes," but I see otherwise.

It is not a simple procedural fix in H.R. 1875, but a major rewriting of the class action rules that would ban most forms of State class actions, in effect, forcing a State class action claims into Federal court where it is likely to be far more expensive for a plaintiff to litigate, where defendants could force plaintiffs to travel excessive distances to attend proceedings, and where class actions are, of course, far less likely to be certified.

Now, to the extent that members of the committee insist on taking up class action legislation, we need to ask ourselves why the bill is written to so exclusively favor corporate defendants? I am aware of a number of complaints about class action procedures—for example, that notices can be incomprehensible, and that wrongdoers are often offered "sweetheart" deals which pay off one class in order to eradicate future claims which were not even before the court or subject to the court's jurisdiction—yet, the measure before us does nothing to deal with these concerns, instead, it benefits only one class of litigants, corporate wrongdoers. As a matter of fact, the most obvious examples of the corporate defendants that will benefit from this bill are the tobacco, gun and managed care industries. So, the members should know that the bill would have a very damaging impact on the Federal and State courts and, as a result of Congress' increasing propensity to federalize State crimes and the Senate's unwillingness to confirm judges, we are facing a real workload crisis in the Judiciary.

By forcing these resource-intensive class actions into Federal court, this bill only aggravates the workload problems and forces victims to wait in a long line by as much as 3 years or more. The net substantive result for victims will be far slower access to justice, precisely the result that many defendants may want.

Mr. Chairman, I would turn back to you any time that I have, and ask that we include in the record a letter from the Conference of Chief Judges and a letter from the Violence Policy Center.

Mr. HYDE. Without objection, so ordered.

[The information referred to follows:]

CONFERENCE OF CHIEF JUSTICES,
SUPREME COURT OF NEW HAMPSHIRE,
Concord, NH, July 19, 1999.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN HYDE: I write on behalf of the Board of Directors of the Conference of Chief Justices (CCJ), to express, briefly, some of our concerns with H.R. 1875, the "Interstate Class Action Jurisdiction Act of 1999." We also wish to offer our continuing assistance to the Committee in its future deliberations on this matter. We understand that H.R. 1875 will be the subject of a hearing on July 21, 1999.

We believe that H.R. 1875, in its present form, is an unwarranted incursion on the principles of judicial federalism underlying our system of government. In essence, it would unilaterally transfer jurisdiction of a significant category of cases from state to federal courts. So drastic a distortion and disruption of traditional notions of judicial federalism is not justified, absent clear evidence of the inability of the state judicial systems to process and decide class action cases in a fair and impartial manner and in timely fashion. Our discussions on this issue within the Conference have failed to identify any systemic problems in state class action procedures. Rather, we have heard only anecdotes of isolated problems that are being addressed on an ongoing basis by state judicial and legislative bodies. We believe

strongly that there is no rational basis for so drastic an invasion of state judicial prerogatives, as encompassed in H.R. 1875.

With regular communication and cooperative effort, state and federal courts have developed a delicate, complementary role in class action jurisprudence. H.R. 1875 would radically alter this relationship.

The Conference of Chief Justices will meet in Williamsburg, Virginia, from August 1 through August 5, 1999. This issue will be the subject of extensive discussions during the meeting. We hope that we will have the opportunity to share with you CCJ's further thoughts on this legislative proposal. In the meantime, should you or your committee staff become aware of specific problems not addressed by state courts in processing and deciding class actions cases, we would be grateful if you would share them with us so that they could better inform our future discussions.

Please feel free to contact me directly, or contact Tom Henderson or Ed O'Connell who staff our Government Relations Office should you have any questions. They can be reached at (703) 841-0200.

Respectfully,,

DAVID A. BROCK, *Chief Justice,*
President, Conference of Chief Justices.

c: Members of the House Judiciary Committee

VIOLENCE POLICY CENTER,
Washington, DC, July 16, 1999.

Hon. JOHN CONYERS,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR REPRESENTATIVE CONYERS: The Violence Policy Center (VPC) is a non-profit organization dedicated to reducing firearms violence in America. The VPC strongly opposes H.R. 1875, a bill that would radically alter state court jurisdiction over class action lawsuits.

Guns kill almost twice as many Americans every year as all other household and recreational products combined. Despite this grim fact, the gun industry is the last unregulated manufacturer of a consumer product.

Citizen lawsuits—including class actions—serve as the only safety "regulation" of the firearms industry. In fact, lawsuits are the only method to force manufacturers of defectively manufactured or designed firearms to make their guns safer. Moreover, litigation is now being used to target the gun industry's unscrupulous marketing and distribution practices.

For example, Remington Arms settled a class action suit in 1995 for $31.5 million. The suit involved 12 models of shotguns manufactured over a 35-year period. The plaintiff shotgun owners alleged that the guns' barrels were made from insufficiently strong steel and therefore prone to explode. As part of the settlement, Remington agreed to upgrade the steel used in its shotguns and to distribute a Shotgun Safety Bulletin warning of the hazard of shotgun barrel explosion. Since no federal safety agency has the authority to issue a recall of defectively manufactured firearms, a lawsuit is the sole mechanism for such gun owners to seek redress. The VPC opposes any legislation that dilutes the ability of consumers to bring such lawsuits.

Furthermore, lawsuits filed recently by cities and individuals seeking to hold the gun industry liable for its marketing and distribution practices often argue novel, untested legal theories. Federal courts are very reluctant to validate legal arguments that have not been heard and accepted by state courts, even if those arguments are entirely consistent with existing state law. Class action suits asserting such theories are likely to be filed in the very near future. Such suits would almost certainly be doomed to failure if they were forced into federal court because of the reluctance of federal courts to embrace legal theories not formally recognized by state courts.

H.R. 1875 is simply the latest assault on the rights of gun consumers and victims of gun violence to hold the firearms industry accountable when its products cause injury or death. The Violence Policy Center strongly urges the House Judiciary Committee to reject this dangerous and unnecessary legislation.

Sincerely,

M. KRISTEN RAND, *Director of Federal Policy.*

Mr. HYDE. The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman.

Thank you for holding this very important hearing on H.R. 2005, the Workplace Goods Job Growth and Competitiveness Act, which I introduced back on June 7, and H.R. 1875, Congressmen Goodlatte and Boucher's Interstate Class Action Jurisdiction Act, of which I am also an original co-sponsor. I might note that the bill that I am going to address now, the 2005, has bipartisan support. We have a primary original co-sponsor, Ms. Slaughter, of New York, who is also onboard.

Mr. Chairman, overage products pose the most serious risk to U.S. durable goods manufacturers and product liability lawsuits. One glaring example of this danger is the recent bankruptcy of the centuries old Madison Technologies. It came as the result of a 1996 verdict that awarded $7.5 million to a worker injured by a machine Madison had built back in 1948—this is shortly after World War II—and that had undergone numerous subsequent modifications without knowledge of the manufacturer.

H.R. 2005 is an 18-year statute of repose for durable goods in the workplace. It is essentially a statute of limitations past which a company cannot be sued for an injury caused by an overage product. However, unlike the statue of limitations, the statute of repose measures the time from the date of the initial sale of the capital equipment.

I might note that it does not deal with household appliances. It does not deal with automobiles or vessels or planes, which are covered in other legislation. We are only talking about durable goods.

Statutes of repose reflect a public policy that after a reasonable length of time manufacturers should not bear the burden of disruptive litigation over products that have functioned safely for many years. Often, this equipment has been resold and modified without the original manufacturer's knowledge or control. Factory installed safety devices are sometimes removed by subsequent purchasers to increase efficiency, while placing employees at increased risk of injury, risks not anticipated by the original manufacturer.

Although they were built decades ago to the safety standards of their day, liability for injuries that occur during the use of these products is potentially endless. Even though most of these cases either never actually go to trial or are won by the defendant manufacturers, they still result in extremely high costs, and many of the businesses that would be affected by this are small businesses, most with under 50 employees, who are the backbone of entrepreneurship and growth and future jobs in this country. In fact, every 100 claims filed against machine tool builders costs the industry $11 million. $6.9 million of this sum is merely transaction cost and does not represent money paid to claimants.

It is important to note that our foreign competitors do not share in the long-term exposure of U.S. manufacturers. U.S. manufacturers who have been in business for many years, must factor into their prices the cost of litigation involving thousands of overage machines. Our foreign competitors do not have these additional costs due to their more recent entrance into the U.S. market. Their liability exposure is additionally limited by the fact that both Europe and Japan have a 10-year statute of repose. An 18-year statute of repose would help to even the playing field by providing U.S.

manufacturers with some certainty regarding their potential liability, and by eliminating needless transaction costs.

Finally, a Federal statute of repose is consistent with the traditions an Anglo-American jurisprudence, which has long recognized the validity of time defenses. These defenses recognize that when litigation threatens to impose liability in situations where a manufacturer has not exercised control over the product for a long period of time, it becomes unfair to hold it accountable for the product's performance.

Twenty States have enacted some form of statute of repose, all of them shorter than 18 years. My home State of Ohio, for example, has a 15-year statute. H.R. 2005 will operate as a two-way preemption, extending the time limitation for injured workers in these States, while creating a workplace statute of repose in 30 States that do not have any statute of repose at all at the present time.

It is important to point out that eliminating needless legal fees and transaction costs does not mean that injured workers will go uncompensated. Mr. Chairman, I would ask for an additional minute, if I could.

Mr. HYDE. Without objection.

Mr. CHABOT. Thank you. Under H.R. 2005, the statute of repose would only apply if the claimant is eligible to receive workers' compensation. If he or she is not, they remain free to sue the original manufacturer for an unlimited period of time. Let me repeat—no injured party will ever go uncompensated under this bill. Moreover, no provision in the bill precludes injured plaintiffs from bringing suit against the parties with direct control over the machine.

Mr. Chairman, again, I thank you for calling this important hearing. I look forward to the testimony of the witnesses this morning, and yield back the balance of my time.

Mr. HYDE. Thank you. Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman. I think the practical result of this legislation, were it to pass, would be to shift the vast majority of class action lawsuits from State to Federal court. It is cast by its sponsors as "allowing" class actions in Federal court, but the real impact is that in almost every circumstance the class action will either be filed or removed to Federal court. And by changing the complete diversity requirement between named plaintiffs and defendants to a minimal diversity between any plaintiff and any defendant, the practical effect will make it so easy for a defendant to remove the case to Federal court that we can almost invariably ensure that that will happen, if the defendant thinks, or any of the defendants thinks, that it is in their interest to have the case tried in that arena.

Rather than streamlining an already difficult process, this legislation would complicate matters further by allowing any one defendant or any one plaintiff to remove a case to Federal court without any agreement from their fellow plaintiffs or defendants.

In the vast majority of these cases, the claims are based on State tort law. Obviously, States have a strong interest in making sure that their law is interpreted and applied correctly. By federalizing class actions, this legislation tramples on States' rights.

Removing class actions to Federal court will not resolve the problems that sometimes arise in these cases, namely, inadequate no-

tice of remedy to class members, collusive settlements between defendants' and plaintiffs' attorneys. There is nothing in the legislation that prevents such problems from happening in the Federal court. In fact, there is a slight presumption which is that bad things are far more likely to happen in State courts than in Federal courts. I am not sure that that is a legitimate assumption on which to base trying to prescribe simply a change of venue and a change of jurisdiction as the cure for all the problems that may exist in class action cases.

These class actions are very important in many cases. They protect consumers who would otherwise find it essentially impossible to get representation. We have heard, for instance, that "Ah, but if the Federal courts do not certify a class, the statute of limitations tolls and the plaintiffs can go back into State court and file their class action there. But the fact is that the bill itself only provides that, upon remand, the statute of limitations is to be tolled to the extent provided under Federal law. It offers no specific protection against State statutes of limitation expiring. So to the extent that the Federal statute is longer than the statute and the class was not certified and the State statute had already expired before the noncertification of the class occurred, the plaintiffs would lose any chance to restore the case to the State courts.

I will be interested in the hearing and to what extent my dispositions against this bill would be alleviated or exacerbated, and I thank the chairman for calling a hearing on this important legislation.

Mr. HYDE. I thank the gentleman. If there are any further opening statements, they will be received into the record at this point in the record. We have a large panel and we would like to get to it so, with your indulgence, our first witness this morning will be Assistant Attorney General Eleanor Acheson, who will be presenting the Department of Justice's views on both of the bills that are the subjects of today's hearing.

I welcome you, and ask that you attempt to keep your oral statement to 5 minutes. We have a little flexibility there, but in the interest of efficiency it would be helpful, and your prepared statement will be placed in the record in its entirety.

Ms. Acheson.

STATEMENT OF ELEANOR ACHESON, ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF POLICY DEVELOPMENT, U.S. DEPARTMENT OF JUSTICE

Ms. ACHESON. Thank you, Mr. Chairman and members of the committee. I appreciate the opportunity to appear this morning before the Committee on the Judiciary, to express the Justice Department's views regarding the proposed Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, and the Workplace Goods Job Growth and Competitiveness Act of 1999, H.R. 2005.

The Department opposes these bills. I have submitted a more extensive written statement for the record. Our written statement describes in detail our reasons for opposing these bills. I will keep my oral statement as short as I can, but not to minimize our other concerns, I will focus on the Department's primary concerns about federalizing class actions and preempting State statutes of repose.

The Class Action Jurisdiction Act of 1999 proposes to address perceived abuses in class actions filed in State courts by moving nearly all State class actions into Federal court. H.R. 1875 is unlike other recent legislation to expand Federal jurisdiction. It is unlike the Multi-Party, Multi-Forum Jurisdiction Act and the Y2K Act, each of which confers Federal jurisdiction over a discrete class of cases because litigation of those cases in State court would be particularly impractical or would defeat the critical goal of having uniform liability standards.

H.R. 1875 confers Federal jurisdiction wholesale over almost every class action in the Nation. The Department recommended that the President veto a bill that nearly federalized all class actions last year.

The sponsors of H.R. 1875 claim that it is necessary to move nearly all class actions to Federal court because class actions are being abused in the State courts. They cite six problems, in particular. In our view, moving class actions to Federal court would not address these abuses.

First, advocates of federalizing class actions claim that State court judges are not adequately evaluating the fairness of class action settlements. This problem stems from an inadequate scrutiny of settlements, to the extent there is a problem, not from the choice of forum. Federal courts have also been known to approve unfair settlements, and moving class actions to Federal court will do little, if anything, to safeguard against collusive settlements.

Second, the proponents of federalization of class actions claim that State courts do not sufficiently protect the constitutional rights of defendants in class actions. This new-found lack of confidence in the State courts is unwarranted and at odds with longstanding Federal court practice and recent Congressional enactments, such as the Prison Litigation Reform Act and the Anti-Terrorism and Effective Death Penalty Act, all of which funnel cases involving individual constitutional rights through the State courts.

There is no reason to suspect that State courts would accord the economic interests of class action defendants any less protection than the fundamental liberty interests of criminal defendants. We therefore do not think that moving class actions to Federal courts will provide any greater constitutional protection to corporate defendants in class actions.

Third, supporters of federalization contend that State courts are too willing to certify nationwide classes, and that litigation in different State courts involving the same plaintiff class can harm class members because they can be played against each other when their attorneys vie to be the first ones to reach a settlement with the defendants.

Many State courts are already aware of this danger and are taking steps to guard against it, such as consolidating parallel lawsuits or refusing/declining to certify nationwide classes.

Supporters of federalization also contend that State courts are less competent than Federal courts at adjudicating class actions, particularly actions involving class members from many States. This is a variation of the earlier arguments that the State courts are incapable of scrutinizing settlements or protecting constitutional rights of class action defendants, and it is similarly, in our

view, baseless. We continue to think it is inappropriate for the Federal Government to pass judgment on the competency of State judges and take away cases from them on that basis, particularly when there is no evidence that the Federal courts possess any greater systemic competence or, in fact, can better police the abuses that have been identified.

Federalization advocates also claim that moving class actions to Federal courts is necessary to protect the interests of out-of-State class members because they do not always receive meaningful notice of their rights to opt out of class action proceedings. But Federal district courts generally guarantee no greater notice to out-of-State class members than State courts, so changing the forum is not likely to address this particular issue.

And the last point that we have discerned behind the push for federalization is the widespread belief that State courts are too willing to certify class actions and that Federal case law and class action certification is preferable to the policies of the States.

While Congress is surely free to impose its policy preferences on Federal courts, we believe it is inappropriate for Congress, through the mechanism of federalization, to override States' policy choices regarding class action practices with its own. Moreover, we would note that the most extreme of these abuses, in fact, have been addressed, and those are identified in our written statement.

For these reasons, moving class actions from State to Federal court is unlikely to solve the problem. Beyond that, H.R. 1875 is not just simply ineffective to the purposes that it is put forward for, it is affirmatively harmful to class plaintiffs, to the States and to the Federal courts, in four ways.

It would deny State residents access to their States' courts by permitting removal of actions dealing solely with the issues of State law. H.R. 1875 would deprive the States of their ability to provide a remedy in a convenient forum for their citizens, and would deny certain plaintiffs meaningful access to the courts, if they are unable to satisfy the requirements of Federal case law, even if the States' policy would have been to allow class certification and to provide relief to those plaintiffs.

Second, H.R. 1875 would usurp State policy on class actions. It would make the Federal certification the only standard. In the vast majority of class actions in the country, either the Federal standard is met or the action is thrown out of court. This would effectively nullify the individual States' policies on class actions procedures. But within our system, States should be free to set policies that differ from the Federal Government's, particularly with regard to the access to their own State court systems. If there are abuses in class actions in State courts, those abuses should be addressed in the State courts and State legislatures, not before the Congress.

H.R. 1875 would generate litigation over its constitutionality. It would expand the Federal court's diversity jurisdiction in a highly selective fashion so that putative class actions that failed to meet the Federal standard for class certification would be returned to State court in disaggregated form for individualized adjudications.

H.R. 1875 would therefore displace the States' decisions as to the proper role of class action procedures in the adjudication of State law claims and could be attacked as an impermissible form of Fed-

eral interference in States' decisions as to how to structure the operations and procedures of their own courts.

Finally, H.R. 1875 would threaten to overwhelm the Federal courts by substantially increasing their already heavy caseloads. The Chief Justice has spoken to this, indeed, as recently as his last Year-End Statement. The Conference of Chief Justices has submitted a letter to the committee expressing its concerns with the bill. And I think we should look to the impact on the State and Federal courts for guidance in this.

In short, H.R. 1875 does not serve its stated purposes, curtailing abuses of State class action procedures. H.R. 1875's federalization of class actions would yield other results. It would deny State residents a State forum and, in many cases, any meaningful ability to seek recovery for their injuries. It will replace the public policy of all 50 States about how to operate their State courts with a single Federal policy. It will overburden the Federal judiciary with class actions dealing, in many cases, solely with issues of State law. Because the bill is ineffective to achieve its purposes and because we believe the impacts of the bill are not at all good policy or in the public interest, the Department strongly opposes H.R. 1875.

The Workplace Goods Job Growth and Competitiveness Act, H.R. 2005, would establish a national 18-year statute of repose for durable goods. This statute of repose would extinguish valid lawsuits that would otherwise be permitted to proceed under State law, and would intrude into the availability of State remedies. By so doing, the legislation would usurp State policies on providing an avenue for redress for personal or property damages to individuals or small businesses caused by durable goods.

H.R. 2005's preemption of State policy appears to be, in the language of the legislation as drafted, one way. I understood Representative Chabot to clarify that it is intended to be two-way, but that is something, the language that would need to be looked at because the language does not, it appears to us, actually say that.

H.R. 2005 also does not provide for any extension of the repose period in harmony with the State statute of limitations, if the individual or business suffers injury in the 18th year of the use of the durable good, despite the difficulty an injured party may have determining when the item was first purchased or leased. For these reasons, we oppose enactment of H.R. 2005.

That is the end of my statement. I would be happy to take any questions.

[The prepared statement of Ms. Acheson follows:]

PREPARED STATEMENT OF ELEANOR ACHESON, ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF POLICY DEVELOPMENT, DEPARTMENT OF JUSTICE

Good morning. I appreciate the opportunity to appear before this Committee to express the Justice Department's views regarding the proposed Interstate Class Action Jurisdiction Act of 1999 (H.R. 1875) and the Workplace Goods Job Growth and Competitiveness Act of 1999 (H.R. 2005).

INTERSTATE CLASS ACTION JURISDICTION ACT OF 1999 (H.R. 1875)

The Interstate Class Action Jurisdiction Act of 1999 (H.R. 1875) proposes to address perceived problems in class actions filed in state court by moving nearly all state class actions into federal court. In our view, however, the transplantation of these actions to federal court is unlikely to curb problems in class action decisions because these criticisms are not unique to state courts—federal courts have been ac-

cused of many of the same problems in class actions. We believe the means chosen in H.R. 1875 would not fix the problems with some class action decisions, and instead H.R. 1875 would:

- Deny State residents access to their State courts;
- Nullify States' policy choices about class action litigation, even though States in our federal system should be free to determine procedures for their courts that differ from federal procedures;
- Spur litigation over its constitutionality; and
- Overwhelm the federal courts with time-consuming class action litigation involving issues of state law.

H.R. 1875 raises the same concerns as the Class Action Jurisdiction Act of 1998 (H.R. 3789), which is substantively identical to H.R. 1875. Last year, we submitted to Congress a Statement of Administration Policy providing that the Administration strongly opposed H.R. 3789, and that if it were presented to the President, the Attorney General would recommend that he veto the bill. *See* Statement of Administrative Policy (issued Oct. 5, 1998).

It is important at the outset to note the role that class actions play in making the courts available to all Americans. In some situations, a large number of individuals are significantly harmed as a group but they have no realistic avenue to obtain justice individually because their respective harms are too small to make individual suits practical. In these cases, a class action in a local forum is virtually the only way these individuals can seek redress through the legal system. Just a few years ago, 500 individuals, most of whom were Washington State residents, sued Foodmaker, a Delaware corporation, in state court for negligence in serving undercooked hamburgers infected with the E. coli bacteria and its "Jack in the Box" restaurants. They received a $14 million settlement.[1] Similarly, some 750 people, most of whom were Colorado residents, were able to bring a Colorado-based class action against a health care center for maintaining unhygienic conditions that caused outbreaks of illness.[2] In Pennsylvania, a class of largely Pennsylvanian car owners burned when their airbags deployed were able to recover from Chrysler the cost of re-fitting their cars with safer airbags.[3] Class actions are also a very efficient means of resolving large numbers of claims that share common issues of fact and law, particularly when state citizens can seek redress in their state courts for violations of their rights under state law. Moreover, without fair access to class action procedures, many individuals' claims could simply not go forward and those that could, as individual suits, would require greater investments of judicial time than class actions, which could delay—and sometimes even deny—justice to those plaintiffs as well; class actions can keep the courtroom doors open. Class actions can also reduce or eliminate inconsistent verdicts, which benefits plaintiffs, defendants, and the entire system of justice. Because of the importance of class actions, we should be cautious in curtailing access to them.

What H.R. 1875 Does

H.R. 1875 would move nearly all class actions—no matter where they are filed—into federal court. The federal district courts currently have jurisdiction over class actions dealing with state law only when *all* of the plaintiffs come from different states than *all* of the defendants. Section 3 of H.R. 1875 would change that rule. Under H.R. 1875, Federal district courts would have jurisdiction in such cases as long as *any* class member is from a different state than *any* defendant and the action involves more than 100 class members or $1 million (as nearly every class action does). Section 4 of H.R. 1875 would permit any defendant, without the concurrence of the other defendants, and any unnamed class member, without the concurrence of the other class members, to remove these state class actions to federal court. Once removed to federal court, the case would be governed by the federal standards for class actions. Any action unable to meet the federal certification standards would be dismissed. Thus, the practical effect of the bill would be to override state class action standards, eliminating *all* class actions that currently are permitted under state law but are barred under federal law.

H.R. 1875 has four narrow exceptions. First, it does not permit removal of class actions concerning covered securities. Second, it does not permit removal of class ac-

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[1] "Last Jack in the Box Suit Settled," *Seattle Times* (Oct. 30, 1997).

[2] Salas v. GranCare, Inc. & AMS Properties d/b/a Cedars Health Care Center, Civ. Action No. 96-CV-4449 (Co. Dist. Ct. 1996).

[3] *See* "Jury Returns $60 Million Verdict in Airbag Class Action Vs. Chrysler," *The Legal Intelligencer* (Feb. 19, 1999).

tions against State government entities or officials against whom Federal courts may not be able to order relief.[4] Third, H.R. 1875 does not create federal jurisdiction over class actions in which the "primary defendants" and a "substantial majority" of the members of the plaintiff class are from the same State and that State's law governs the action. Like the others, this third exception is not likely to produce a significant reduction in the number of State class actions subject to removal. Because defendants in class actions are likely to be corporate entities whose citizenship has no necessary relationship to where they do business and thus where claims against them arise, the exception for cases in which plaintiffs and defendants are predominately citizens of the same State is likely to apply to few cases. Finally, and as alluded to above, H.R. 1875 would not permit removal of class actions involving fewer than 100 class members or less than $1 million. Because these four exceptions are likely to be insignificant, the effect of H.R. 1875 would be to grant defendants the option of proceeding in State or Federal court in almost all State class actions.

H.R. 1875 is accordingly far broader than other legislation before this Congress. The Multiparty, Multiforum Jurisdiction Act of 1999 (H.R. 967) would relax the federal diversity requirements for a very narrow band of cases involving airplane crashes and other single-event accidents involving more than 25 victims. Such cases have two distinctive features: the victim-plaintiffs are often from different states and their lawsuits usually involve the same liability and causation issues. These features make these types of actions particularly well suited to resolution in the federal courts. The Y2K Act (H.R. 775) would create federal jurisdiction over Y2K class actions involving more than 100 class members and more than $10 million. The issues underlying Y2K actions are literally unprecedented, however, and have the potential to paralyze the legal system. Unlike these other bills, H.R. 1875 does not invoke federal jurisdiction to solve a specific and or, indeed, unique problem. Instead, it bluntly confers federal jurisdiction over almost every class action in the nation. This blunderbuss approach to civil reform distinguishes H.R. 1875 from this other legislation and, in our view, is an inappropriate approach to meaningful reform.

H.R. 1875 Does Not Accomplish Its Purported Goals

The sponsors of H.R. 1875 claim that it is necessary to move nearly all class actions to federal court because class actions suffer from several problems in the state courts. The sponsors claim that state courts:

(1) approve class action settlements where the class members receive token relief, such as discount coupons, while the class attorneys receive millions of dollars in fees;

(2) do not adequately protect the due process rights of defendants in class actions;

(3) too readily certify nationwide class actions that pit the same classes of plaintiffs against one another, resulting in the lower settlements for plaintiffs;

(4) are ill-equipped to handle the complexities of class actions;

(5) do not adequately protect the due process rights of out-of-state class members who sometimes receive little or no notice of pending class actions; and

(6) are too willing to certify classes, even when the underlying action is frivolous.

As we discuss below, moving class actions into federal court would not solve these alleged problems.

Claim: Collusive Settlements. Advocates of federalizing class actions claim that state court judges are not adequately evaluating the fairness of class action settlements. For support, they point to several class actions where the defendants and class attorneys negotiated settlements in which the defendants were absolved of liability, the class attorneys received millions of dollars in fees, and the class members received discount coupons or other virtually worthless relief. We agree that this has been a problem in some class actions. But assuming that this problem stems from inadequate scrutiny of settlements, it is a problem that is not confined to state courts. In fact, most of the examples cited by supporters of H.R. 1875 refer to cases

[4] This latter exception appears to be superfluous in light of *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). In that case, the Supreme Court held that the Eleventh Amendment forbids Federal courts from ordering States and State officials to conform to State law.

that were litigated in *federal* court.[5] Those anecdotes dealing with actions in state courts, moreover, seem to reflect problems with individual judges or particular locales rather than systemic problems in the states' handling of class actions. Moving class actions to federal court will therefore do little, if anything, to guard against collusive settlements.

Claim: Insufficient Protection of Corporate Defendants. Other proponents of federalization claim that state courts do not sufficiently protect the constitutional rights of defendants in class actions.[6] In essence, these critics believe that the state courts are incapable of safeguarding the constitutional rights of litigants. This newfound lack of confidence in the state courts is unwarranted and at odds with longstanding federal court practice and recent Congressional enactments. For example, for over a century, the federal courts have insisted that state courts be given the first opportunity to rectify any constitutional violations raised by state convicts in federal habeas petitions. Congress recently reaffirmed this principle by enacting the Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act, both of which funnel cases involving the most fundamental of individual constitutional rights—liberty—through the state courts. There is no reason to suspect that state courts would accord class action defendants any less protection than criminal defendants. Indeed, the Supreme Court has "repeatedly and emphatically rejected" the argument that the state courts are incompetent to adjudicate federal constitutional claims.[7] Because state courts are obligated to apply the Constitution to litigants in their courts, and in light of the time-honored confidence in the ability of state courts to meet that obligation, we do not think that moving class actions to federal courts will provide any greater constitutional protection to corporate defendants in class actions.

Claim: State Courts Certify Nationwide Class Actions. Another complaint often leveled at state courts is that they are more open to entertaining class actions involving class members from numerous states—so-called "nationwide" class actions. Critics assert that permitting litigation involving the same nationwide class to proceed in parallel state court actions is duplicative and potentially harmful to class members, who can be played against each other in a race to the lowest settlement as each classes' attorneys vie to be the first ones to reach a settlement with the defendants and be awarded fees. While we agree that this is a problem in theory, state courts are aware of this problem and are already working to avoid it—either by consolidating parallel actions into a single action,[8] or by refusing to certify a nationwide class.[9] Thus, while moving class actions to federal court might eliminate the theoretical possibility of a "race to the bottom," we do not believe that the state courts are incapable of guarding against this danger or that federalization of class actions—as opposed to other, more modest proposals—is a rational way of addressing this issue.

Claim: Class Actions Are Too Complex for State Courts. Supporters of federalization also contend that state courts are less competent than federal courts at adjudicating class actions, particularly actions involving class members from many states. They claim that state judges are unfamiliar with how to interpret out-of-state law and safeguard the rights of out-of-state class members. We think these

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[5] *See, e.g., In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F. 3d 768 (3d. Cir. 1995) (overturning lower federal court's approval of a settlement awarding class members a $1000 coupon toward future purchases of defendant's cars); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 308 (N.D. Ga. 1993) (federal court approves settlement where plaintiffs receive $10 and $200 coupons for flights costing $50 to $1500); *New York* v. *Nintendo of Amer., Inc.*, 775 F. Supp. 676, 681 (S.D.N.Y. 1991) (federal court approves settlement awarding $5 coupons for future video games costing $100); *In re Matzo Food Prods. Litig.*, 156 F.R.D. 600 (D.N.J. 1994) (federal court approves settlement where defendant in a price fixing case agrees to donate food products to charities, while the plaintiffs' attorneys receive $450,000 in fees).

[6] Usually, critics making this particular claim point to the practice of some state courts to issue certification orders *ex parte*. These complaints have focused on one county in a particular state, however, and the Alabama Supreme Court has dealt with that problem. *See Ex parte Equity Nat'l Life Ins. Co.*, 715 So.2d 192 (Ala. 1997); *Ex parte Citicorp Acceptance Co.*, 715 So.2d 199 (Ala. 1997); *Ex parte First Nat'l Bank*, 717 So.2d 342 (Ala. 1997).

[7] *Moore* v. *Sims*, 442 U.S. 415, 429–30 (1979); *see also Hawaii Housing Auth.* v. *Midkiff*, 463 U.S. 1323, 1325 (1983) (Rehnquist, J., as Circuit Justice) ("frank[ly] recogni[zing] that state courts, as judicial institutions of co-extant sovereigns, are equally capable of safeguarding federal constitutional rights").

[8] *Cox* v. *Shell Oil Co.*, 1995 WL 775363 (Tenn. Ch. 1995) (reviewing settlement that coordinated and settled three competing national class actions—one in California, one in Tennessee, and one in Alabama).

[9] *R.J. Reynolds Tobacco Co.* v. *Engle*, 672 So.2d 39 (Fl. Ct. App. 1996) (de-certifying nationwide class seeking recovery against the tobacco industry, but permitting statewide class to proceed).

concerns are groundless. There is no empirical support for the first claim, which is rebutted by the fact that state courts routinely interpret the law of other jurisdictions. When a litigant raises a claim relying upon federal law or the law of another state, for example, the state court is obligated to research, evaluate, and apply that foreign law. For the reasons discussed elsewhere, there is also no reason to suspect that state courts are incapable of safeguarding the liberty or property rights of litigants before them. It is, in any event, wholly inappropriate for the federal government in this context to pass judgment on the competency of the state judges and take cases away from them on that basis.

Claim: Inadequate Notice to Out-of-State Class Members. Federalization advocates also claim that moving class actions to federal courts is necessary to protect the interests of out-of-state class members, who sometimes do not receive meaningful notice of their rights to opt out of class action proceedings in other states and who therefore lose their right to bring individual actions once the class action is resolved. This criticism ignores that, in both state and federal class actions, both the class plaintiffs and class defendants play a role in determining how notice is to provided, and both can raise objections to the adequacy of notice. This criticism also fails to recognize that federal district courts generally guarantee no greater notice to out-of-district class members than state courts, so changing the forum is not likely to improve the treatment accorded to class members who live in a different state or a different federal district.

Claim: State Courts Certify Too Many Class Actions. The final complaint most often leveled against class actions in state court is that state courts are too willing to certify class actions, and that this willingness gives class plaintiffs more power to extort settlements because class action defendants feel more compelled to settle an action once a class is certified.[10] The only way that it makes sense to solve this problem by moving class actions to federal court is if federal courts are more reluctant to certify classes, since otherwise, removal to federal court would not reduce the possibility of "extorted" settlements. Thus, H.R. 1875 appears to be premised on the notion that federal case law on class certification is preferable to the policies of the states on this issue. As a factual matter, however, there is no proof that state courts are, as a general rule, more flexible in certifying classes than the federal courts. As a policy matter, while Congress is free to impose its policy preferences on federal courts, we believe it inappropriate for Congress, through the mechanism of federalization, to override the States' policy choices regarding class action practices. We therefore think that moving class actions to federal court would be an ineffective—and is surely an inappropriate—means of stopping the certification of frivolous class actions.

As this discussion illustrates, moving class actions from state to federal court is unlikely to solve the problems that the proponents of federalization say need to be corrected. We oppose H.R. 1875 on this ground alone. H.R. 1875 is more than simply ineffective, however. It is affirmatively harmful to class action plaintiffs, to the States, and to the federal courts.

H.R. 1875 would deny state residents access to their states' courts. H.R. 1875 would permit cases concerning solely state law—cases most appropriately tried in state court—to be removed to federal court. For example, a class action brought under state law concerning injuries caused by a consumer product would be removable to federal court solely because a primary defendant happened not to be a citizen of the State, even if the defendant had substantial operations in the State or had benefitted by doing business in the State. H.R. 1875 would therefore preclude the state courts from addressing many state and local matters and would effectively circumvent and render irrelevant a significant aspect of the state court system. H.R. 1875 would deprive the State of the ability to provide a remedy and convenient forum for its citizens and also would deny or, at a minimum, burden meaningful access to the courts to those plaintiffs unable to satisfy the requirements of federal case law, even if the State's policy would have been to allow class certification and to provide relief to those plaintiffs.

H.R. 1875 would usurp state policy on class actions. Because H.R. 1875 would require dismissal of class actions that were removed to federal court but do not satisfy federal certification standards, H.R. 1875 would make the federal certification standard the only standard in the vast majority of class actions in this country—either the federal standard is met or the action is thrown out of court. This would effectively nullify the individual States' policies on class action procedures. Such

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[10] A recent study by the Federal Judicial Center found that "there were not objective indications that settlement was coerced by class certification." *See* Thomas E. Willging, *et al.*, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Federal Judicial Center 1996), at 60, 90 (1996).

nullification is at odds with our federal system of government. Within our system, it is well established that States are free to set policies that differ from the federal government's, especially with regard to the accessibility of their own state court system, as long as those policies are consistent with the federal Constitution. If there are concerns about the manner in which States are exercising their authority within the sphere permitted under the Constitution, we believe that the appropriate venue for these policy discussions is in the state courts and legislatures—not before Congress. By imposing Congress's policy preferences on the state courts, H.R. 1875 disrespects federalism.

H.R. 1875 would spur litigation over its constitutionality. H.R. 1875's displacement of State-law class certification procedures could be subject to constitutional challenge on federalism grounds. As a general matter, Congress has the power to prescribe the manner in which Federal courts, in the exercise of their diversity jurisdiction, handle issues such as class action certification, "which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Hanna* v. *Plumer*, 380 U.S. 460, 472 (1965). However, H.R. 1875 would expand the Federal courts' diversity jurisdiction in a highly selective fashion. Putative class actions that failed to meet the federal standard for class certification would be returned to state court in disaggregated form for individualized adjudications. The resulting displacement of States' decisions as to the proper role of class action procedures in the adjudication of State-law claims could plausibly be attacked as an impermissible form of federal interference in States' decisions as to how to structure the operations of their own courts. Indeed, just this past Term, the Supreme Court reaffirmed the sovereignty of the States and H.R. 1875 might be attacked as an affront to that sovereignty.[11]

H.R. 1875 threatens to overwhelm the federal courts. We also are very concerned about how H.R. 1875 will impact the Federal judiciary at a time when the Chief Justice of the United States has expressed serious concern about the marked expansion of caseloads of Federal courts. See Chief Justice Rehnquist, *The 1998 Year-End Report on the Federal Judiciary* at (I). Preliminary data from RAND's ongoing study of class actions suggest that more than half of such litigation is in State courts. Class actions are among the most resource-intensive litigation before the judiciary. A study of class actions in Federal court by the Federal Judicial Center showed that class actions took two to three times the median time of a civil case from filing to disposition and consumed almost five times more judicial time than other civil cases. FJC, *Empirical Study of Class Actions in Four District Courts* at 7. By expanding Federal court jurisdiction for class actions and permitting removal from State courts, this bill would move most of this litigation into the Federal judicial system, potentially requiring substantial new Federal resources. Responsibility in this area should continue to be shared among both the Federal and State judicial systems.

Concluding Remarks on H.R. 1875

As discussed in this testimony, H.R. 1875 is ill-suited to serve its sponsors' purposes—solving problems with state court class action procedures. Instead, H.R. 1875's federalization of class actions would deny state residents a state forum (and in many cases any meaningful ability to seek recovery for their injuries), replace the public policy of all 50 States about how to operate their courts with a single federal policy, and overburden the federal judiciary with class actions dealing solely with issues of state law. Because we disagree with a measure having these effects, the Department of Justice strongly opposes H.R. 1875.

WORKPLACE GOODS JOB GROWTH AND COMPETITIVENESS ACT OF 1999 (H.R. 2005)

The Workplace Goods Job Growth and Competitiveness Act of 1999 (H.R. 2005) would establish a statute of repose for "durable goods," which are defined in the bill as certain products that are expected to last more than three years and that are used in a trade or business, or by the government. This proposed national statute of repose would extinguish valid lawsuits that would otherwise be permitted to proceed under state law. This sort of intrusion into the availability of state tort remedies is inappropriate absent compelling and well-documented evidence that the defendants' need for civil immunity outweighs the strong policy that individuals and businesses be able to seek relief for their injuries. We do not think that H.R. 2005 passes this test.

H.R. 2005 would create an absolute bar on recovery for property damage involving a durable good if the action is filed more than 18 years after the first purchase or

[11] In *Alden* v. *Maine*, 1999 WL 412617 (June 23, 1999), the Court observed that "[t]he States . . . retain 'a residuary and inviolable sovereignty' . . . [and] are not relegated to the role of mere provinces or political corporations."

lease of the good. H.R. 2005 would also bar civil actions for death or personal injury involving a durable good against a manufacturer or seller of a durable good filed more than 18 years after the durable good was first bought or leased, if the claimant is eligible for worker compensation and the injury does not involve "toxic harm." H.R. 2005 provides exceptions to the 18-year bar for products used primarily to transport passengers for hire, products covered by express warranties as to the safety or life expectancy of a product for longer than 18 years, and products already covered by the statute of repose in the General Aviation Revitalization Act of 1994.

As noted above, H.R. 2005 would bar certain property damage claims and, unlike personal injury in the workplace, there is no alternative administrative relief for such claims by individuals or businesses. It thus extinguishes state lawsuits in an irrational manner. For example, if a machine component with a latent defect buckled after 20 years and caused the machine to explode and injure three people, the people could sue for their personal injuries as long as they were not eligible for workers compensation. The machine owner, however, would be completely barred from recovering his substantial property loss. Additionally, this proposed national statute of repose would bar some State law claims in which an individual or company has been seriously damaged by a product—and even before some victims will be injured by the defective good—although the manufacturer was negligent or knew the product was dangerous or defective.

H.R. 2005 is flawed in other ways. It usurps State policies on providing an avenue for redress for personal or property damages to individuals or small businesses caused by durable goods. It would preempt State law only when a State has made a policy choice to allow more than 18 years for its statute of repose (but not less than 18 years) or in which a State has chosen not to enact a statute of repose so that its citizens can recover for injuries or losses caused by a dangerous or defective product regardless of when the good was first used. It also does not provide for any extension, in harmony with a State's statute of limitations, if the individual or business suffers injury in the 18th year of use of the durable good, despite the difficulty an injured party may have determining when the item was first purchased or leased. In addition, the bill potentially raises due process and federalism concerns which the Department is currently studying. For these reasons, we oppose the enactment of H.R. 2005.

Thank you for the opportunity to submit the views of the Department of Justice on these pieces of legislation.

Mr. HYDE. Thank you, Ms. Acheson. Mr. Conyers.

MR. CONYERS. I am struck by your comments, Ms. Acheson, that the abuses that are complained of could as likely occur in either court. And I am amazed that this hasn't been candidly agreed to by the proponents of the measure that is before us, 1875. The current class action system problem, including discount coupon settlements, reversionary settlements, future claims settlements, and others that you mentioned, would still go on, so it is not quite clear how these abuses would be cured in the Federal system. Do you have any further comments about that point of view?

Ms. ACHESON. Well, I think we agree, Mr. Conyers, with your assessment, that even accepting that the incidents that have been reported, and that no doubt have occurred, have arisen to the level that they could really be considered systemic abuses, we do not see how this legislation would, in fact, address those abuses.

In our written statement, we have in more detail tried to identify places where, in fact, the particular problems that the proponents of the bill identify have, in fact, occurred in Federal courts, in the context of cases that are Federal class action cases, not State class action cases, and draw your attention to the written statement, particularly the part of it where we discuss the concern about collusive settlements and issues relating to others of the concerns. And turning it around, I would note that some of the other concerns expressed—for example, the business that has been mentioned in some of the opening statements about class actions in State courts, State courts not being able to coordinate discovery and achieve

other procedural efficiencies with class actions proceeding in more than one State. In fact, we cite, again in the written testimony, a number of examples where State courts have been aware of class actions on the same issues proceeding in other jurisdictions, and have taken steps to connect with those other jurisdictions and to achieve efficiencies in discovery and the resolution of various kinds of matters, which seem to me to suggest that State courts, not only on their own but working together, can achieve a lot of the reforms and salutary points that the proponents of the legislation are concerned about.

MR. CONYERS. Thank you so much. Now, isn't it ironic that H.R. 1875 would deny State residents access to their own State courts? And I am looking at your testimony in which you spend some time on page 7 dealing with that, and that we may also get into some serious constitutional questions if this measure were to become law. Could I get your comments on those two matters?

Ms. ACHESON. Well, I think on the first, there are a bunch of levels of that issue. The first is simply the fact that State court systems have local trial courts of general jurisdiction usually in every county seat and often in other towns and counties that people can use and go into, whereas often there is only one Federal court in a State, sometimes there are outposts of the Federal court, but it is a much more difficult proposition for individuals and lawyers from small towns to actually get to the Federal court.

Secondly, as I am sure most of the committee is aware, there are often very different bars that practice in the State courts and the Federal courts, with lawyers of, again, further away from the individuals that they are attempting to represent. So there are a lot of logistical, financial, geographic barriers. There then is the problem raised if you get involved with a class action in a State court that gets removed to a Federal court and then is dismissed out of the Federal court and sent back, as was the point made in, I think, Mr. Berman's opening statement, you may lose your opportunity to re-file if, in fact, the statute of limitations has run, because that would be a function of Federal law, not State law. There is no protection offered there.

And, finally, on the constitutional point, as I think we addressed in our written testimony and in other places, concerning class action reform, there are serious questions of constitutionality when the Federal Government attempts to deal with State procedural reform or reforms in State courts, and it seems particularly interesting, after this last term of the Supreme Court when, in a number of the decisions, particularly *Alden* v. *Maine*, the majority of the Court emphasized heavily that States are simply not political subdivisions that we may play with in one direction or another and instruct on whether they shall or shall not be open to certain kinds of cases but, in fact, States are sovereigns, and they should be treated as such. And they have areas of responsibility and areas of their own jurisdiction that we should take very seriously.

MR. CONYERS. Thanks for joining us.

Mr. HYDE. The gentleman's time has expired. The gentleman from North Carolina, Mr. Coble.

MR. COBLE. Thank you, Mr. Chairman. Ms. Acheson, good to have you with us. Mr. Chairman and fellow members of the com-

mittee, I have heard from constituents who support this legislation and constituents who oppose it. So, naturally, I am for my constituents, I always try to be. It is going to be difficult, however, to walk that delicate line because of the disparity, and I really have not made up my mind yet, but I commend those who have worked so hard in bringing it to this level.

Ms. Acheson, you indicated that class action matters are abused in the State courts, and I cannot confirm nor refute that numberwise. I want to get back to that with you in a minute. I share with my good friend, Mr. Berman, from California, the fear that he expressed, and that fear is that this could possibly lead to an accelerated path from the State courts to the Federal courts. I am uneasy about that momentarily.

Let me ask you this, Ms. Acheson. Does the Clinton administration believe that Federal court diversity jurisdiction serves a useful purpose?

Ms. ACHESON. I think the answer to that is yes.

Mr. COBLE. What would that purpose be?

Ms. ACHESON. Well, I think the historical purpose is still one that we need to have some concern about and pay some attention to, to permit situations where you have complete diversity, where you have somebody who may find themselves in a totally foreign jurisdiction being able to get to a Federal court. It is, I think, the view of the Justice Department at least, that what the Federal courts are telling us and what we see broadly in stepping back from the Federal court, from this particular question, to look at the business of the Federal courts, is that there is a judgment that has been made long since, certainly, by the Congress, but it is, I think, shared by the judges of the Federal and State courts alike, that diversity jurisdiction, as it now stands, performs an effective division of work between the courts, leaving most of the issues that relate to relationships between people, whether they are contractual or whether they are tort kinds of issues, in the State courts, and only provide in a relatively small number of incidents, those that meet the diversity requirements as they now are, into the Federal courts. But as I am sure you are aware, Federal judges, for a long time, have been concerned about diversity jurisdiction and it has been a proposal—I think it is the Long-Term Study Commission of the Federal courts from time to time—and I do not know the views of the Judicial Conference currently on the issue—that maybe we ought to consider abolishing diversity jurisdiction.

Mr. COBLE. My red light is about to illuminate, Ms. Acheson. Let me ask you this. Talk to me in a little more detail about the abuse that class action matters impose upon State courts, that you mentioned earlier.

Ms. ACHESON. Well, I think what I was trying to say, Mr. Coble, is that the reports that we have seen on class action do not suggest to us—they do not say, as we read them—that there is systemic class action abuse. There have been some discrete, really outrageous, problems that the proponents of this legislation and others have brought to our attention—for example, the practice apparently in certain counties of Alabama—of certifying class actions on an ex parte basis. I mean, there is no defense of that, it seems to

me. That is an outrageous practice, and one that is absolutely fairly complained of.

When brought to the attention of the Supreme Court of Alabama, it was ended. And there are, and we cite in our testimony, cases which have taught, from the Supreme Court of Alabama to the lower courts, how they should proceed with class actions, very recently. That is probably the most extreme example of something that may have been systemic in a particular set of communities, but the courts themselves have moved to cure that problem.

I think the point I was trying to make is beyond that and those kinds of issues, but that is certainly the most dramatic one, what we see are problems that occur in some types of cases, but that it is not intrinsic to the State class action versus the Federal class action. It is intrinsic to whether or not a judge, whether he or she is a State judge or a Federal judge, whether the issues are brought to his or her attention, whether he or she has the time and resources to handle the issues. Nothing magically changes by moving this piece of business, of litigation business, to the Federal court.

Mr. HYDE. The gentleman's time has expired.

Mr. COBLE. I was about to yield back, Mr. Chairman. Thank you.

Mr. HYDE. Thank you. The gentleman from Massachusetts.

Mr. FRANK. Thank you, Mr. Chairman. I apologize for being late, but I did, thanks to my colleague, look at the part of your testimony that I am most focused on.

Last year when this bill first came up, or 2 years ago when I was the ranking democrat on the subcommittee, I had some sympathy with it in that I am sympathetic to the notion that we should not treat diversity too legalistically, and if, in fact, it is substantively more of a multi-State thing, it should go Federal, and if it is essentially a State one it should not, but then we came across an aspect of it which disturbed me enough to drive me away from the bill, and I notice you mentioned it, and it is this. If we were talking about legislation that simply said, look, if it is going to be a class action, let the judge decide—the Federal judge—whether it makes more sense, taking everything into account—the nature of the law involved, the nature of the parties—to do it Federal rather than State—but to the extent that it is a way to prevent a class action from happening all together, I do not like it, and that is what I need you to address, and you do talk about it.

As I understood it, by the time we got into the details of last year's bill—and I am not sure this wasn't added somewhere along the way—if you filed a State class action and it was removed under this bill, under the new sort of functional definition of "diversity," and you went into Federal court, and you did not meet the Federal court class action standards, in one version of the bill you could have lost under the statute of limitations and you could never have gotten it back. Now I am told you seem to be suggesting here that in this situation, if you are removed and you are found not to be eligible for a Federal class action, the plaintiff can go back to the State, but only as an individual and not as a class action. So, in other words, does the language of this bill say that if you remove a State class action to Federal court and you do not meet the standards—if the Federal judge finds that it is removable—but then we find that it does not meet Federal standards for a class

action but it would meet State class action, that then is canceled out and you can't run a State class action. When you talk about it can go back in disaggregated form, is that what you are saying?

Ms. ACHESON. Well, I think actually the language, unlike last year, says that if the action does not meet Federal court standards after removal, it will be dismissed and it can go back to the State court, but presumably what will happen is that if it goes back to the State court, people would, if they were to file a class action application again, somebody could remove it again, and you would get in sort of a cycle of spinning the thing around because, as I understand, the language this year is different from last year. Last year, it was remanded "stripped" of class allegations, but now it is just——

Mr. FRANK. Well, I thank you, because people have told me my objection was met, but it seems to have met itself coming through a revolving door. [Laughter]

Mr. FRANK. In other words, last year they said if you went into Federal court and you didn't meet a class action, it was sent back, it was remanded, and it couldn't be a class action. This year it is—not remanded, it is dismissed—I assume, with a complete tolling of the statute of limitations. There was some vagueness on that last year. But it would have to have, I would assume—that wouldn't make any sense, even as a dodge, unless there was a complete tolling of the statute of limitations.

So you are saying what it says is if you don't meet Federal class action standards, you can be returned, but if you then filed it, it would go back again. That would seem——

Ms. ACHESON. Well, it might well go back again, and you don't have protection——

Mr. FRANK. Well, certainly, no one can logically think that a scheme ought to be that you would forever be able to file in State court and forever be removed and forever dismissed, so I would assume that was a good faith drafting error, and that if we correct that, the people wouldn't mind.

I will say this, my own view on this is I would be prepared to support legislation that said some things make more sense to be tried as Federal class actions rather than State class actions, but if it went to Federal court and was found not to be a class action, it could go back to the State and it would then be a class action and not removable, and that people would not have the option of creating that merry-go-round. You clear up this confusion I had when people told me that was resolved, but it was clearly resolved in a way that did not resolve it, so if and when we reach the point of a markup, that would be an amendment that I would put forward, and it would be, from my standpoint, the sine qua non for supporting any kind of legislation like this.

Let me just say in 30 more seconds, if I could, Mr. Chairman, I think it is a little bit of false advertising, to some extent, because this bill was originally described to me as a way of getting class actions into a more logical forum, if they were, in fact, diversed rather than not, but on the point you just mentioned, it turns out also to be a way to prevent any class action from being brought at all. That is a very different issue, and I think we ought to be very clear that that, then, is really the most important issue. Do you

frustrate some class actions? Are we saying that the Federal Government will step in, in effect, and not allow some class actions that could otherwise have been brought at the State level. That is very different than deciding what is the proper forum for a class action. Thank you, Mr. Chairman.

Mr. HYDE. I thank the gentleman. Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. Ms. Acheson, welcome.

Yesterday, the President signed into law legislation dealing with Y2K litigation, and as a part of that bill that he signed into law, there was class action reform that the principal application of it is very similar to this legislation. It uses Federal question instead of diversity, but basically all Y2K cases are removed to Federal court above a certain threshold, and even below that threshold, if they ask for punitive damages. In other words, almost any Y2K lawsuit can be brought into Federal court as a class action.

And I am wondering why the administration would believe that that reform is appropriate for Y2K issues, but not for other forms of class action?

Ms. ACHESON. Well, I think that the answer to that question turns exclusively on the "once in a millennium" nature of this class action—not class action—this Y2K litigation concern phenomenon. There is no question about what will happen with Y2K. There is a serious question about what is going to happen with respect to litigation fallout over Y2K problems.

Mr. GOODLATTE. Why would it be more suitable to hear Y2K class actions in Federal court, than a class action in some other area of the law?

Ms. ACHESON. Because there, at least as advertised by the people who originally supported all of the Y2K litigation legislation, and it seemed to the administration that it made sense, that Y2K will be a set of problems—if, in fact, they develop on the scope and scale that people were concerned about around the Y2K event itself and the fallout from it—that needs to be addressed quickly and as broadly as possible, and the thought was that that could probably be done in the time that we were concerned about, against the concerns that the people who at the very same time said they were going to have to be worried about fixing Y2K problems as well as dealing with the litigation in the Federal court. But, as you know, that change in policy, that exception from the administration's policy and consistent position on this, is a window in time that expires, I believe, in 2003.

Mr. GOODLATTE. Well, I would agree that it is a good opportunity to see whether these reforms that are contained in that legislation are good reforms, but I would further argue that if it turns out that, indeed, they are good reforms, then what is good for Y2K class actions ought to be good for other class actions as well.

Let me ask you about another area of your statement. You say that this legislation would deny State residents access to their State courts, but isn't that what diversity jurisdiction is all about? After all, a defendant brought into a State court class action from another State, has automatically been denied access to their State courts, by being brought into Alabama or some other State that they have to defend this in, and the purpose of diversity jurisdic-

tion was to assure all parties the opportunity, where you had multi-State litigation, to be heard in what was perceived to be a more neutral arbiter, that being the Federal courts. In fact, plaintiffs from other States, in class actions brought in one State, are being denied access to their own court, or they have to bring their own class action in their State, which creates an inefficiency when you are talking about bringing a separate class action in each of 50 States when one Federal class action could take care of all of them.

I do not buy your argument that State residents are denied access to their courts when that exists already automatically under these types of class actions that involve multi-State plaintiffs and defendants who are forced into the courts of one State.

Ms. ACHESON. Well, maybe I am not understanding your question, but it would seem to me the point you are making would suggest that then there would be no need for this legislation. There is a clear set of circumstances in which somebody can exercise their rights to bring a case from the State court to the Federal court. That just doesn't happen very often under the current structure of diversity.

Mr. GOODLATTE. Well, it does for somebody who has a $75,001 slip-and-fall case involving somebody who is a defendant in another State. They can bring that in Federal court. But if you have a case involving a million plaintiffs from all 50 States but the total amount of their claim is only $10 billion, or $10,000 per plaintiff, they can't bring that $10 billion lawsuit into our Federal courts denying the plaintiffs in 49 of those States and all of the defendants outside of the State in which the class action is brought access to their State courts. I agree with you that that's not a problem for those other folks because we are providing for them under our constitutional remedy for that, a fair national place to bring them into our Federal courts. But your concern for the State residents of one State, when you're talking about a multi-State class action with plaintiffs and defendants from many, many States, seems to me to be not a strong argument against this legislation. We are going to give everybody a fair opportunity to be heard in a neutral jurisdiction.

Mr. HYDE. The gentleman's time has expired, unless the gentlelady wishes to answer.

Ms. ACHESON. Well, I would, I guess, just make this point. It does seem to me that minimizing diversity and the other requirements to bring actions in Federal courts is going to result in a far greater number of plaintiffs who initiate claims being taken out of their State court systems into Federal courts, and that raises the kinds of issues that I talked about before. And, in addition, I think the whole premise of all the sort of issues that were raised as reasons that we need this legislation go to question the ability of State courts and State court judges, and I think that is an unfair and unfounded premise. I think State court judges and State courts have demonstrated for most of this century that they are on top of the law of their own jurisdictions and others and have had to deal with that law in many, many contexts as Federal judges do. So, I would just make that point.

Mr. HYDE. Thank you, Ms. Acheson. I would just comment to the rest of the committee that we have a large panel following Ms. Acheson, and so I hope you will save some of your most trenchant questions for the next panel and not use them all up on Ms. Acheson.

With that slight benign admonition, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman. If I had trenchant questions, I would defer them to the next panel. [Laughter]

Mr. BERMAN. I can't help but remarking that when Y2K was before this committee, the fundamental thrust of the argument was this is a unique, one-time situation, the need to provide meaningful remedies at the same time as we encourage fixes to the problems. This is sui generis. This is the case to take, to federalize, to provide some rules for quick decisions, and a chance to operate. And within 2 weeks after it passes, the argument that some people predicted would be made is being made. If it is good enough for Y2K, why isn't it good enough for every conceivable class action, without regard to the nature of the cause of action, to come and be federalized. The argument has quickly shifted, and the camel's nose under the tent argument is frequently a camel's nose under the tent, but in this case, there seems to be some validity to the concerns that opponents of the legislation have.

The second thing is, I think, just to reemphasize the point that the gentleman from Massachusetts made, the goal here is not simply fairness for plaintiffs and defendants dealing with the State court hearing a nationwide class action that affects far more people out of the State than in the State. By the way this bill is structured, the principle of this bill is whatever the most restrictive, most rigorous, least liberal standard is for class actions, that is what will prevail. So that if the Federal court decides it is not an appropriate certification, it goes back to the State courts, but not for the States to apply their rules of certification, but simply to bring an action whereby it can once again be removed, thereby defeating any class that is broader than the one that the Federal court decided was appropriate to certify.

The one argument that I think does have some meaning to me is the issue of the State court certifying nationwide class actions. I don't quite understand what the States really can do to bring coherence to that process and coordination to that process. You touch on it, but maybe you could develop it a little more. What are the kinds of things they could do that would say there are remedies other than doing what this legislation does? That is one question I have.

And the second one was, I don't quite understand the argument on the constitutionality, although I see you are citing without approval the decision a couple of weeks ago that the Federal system has just been inverted and now the States are immune from different kinds of suits under Federal legislation.

Ms. ACHESON. Well, let me, if I may, take your second question first. I am quite mindful of the fact that sitting somewhere right behind me is the former head of the Office of Legal Counsel of the Department of Justice and Acting Solicitor General, who is probably ground zero of wisdom about constitutional issues, and I am hardly that, but the point that I was making about the recent cases

from the Supreme Court and their teachings on the status of the States is really more a policy issue that I think—and I raise it in that context—but it is a point that we need to be aware of as we move forward because it may well be that the sort of relationships and the abilities of the Congress to do things with respect to State substantive law and procedures are, in fact, in the midst of some change, and it seems to me it is well worth keeping that in mind. But leaving those cases aside, as I understand it, the Supreme Court has made clear that, in fact, there are constitutional questions about the Federal Government, the Congress, and other elements of the Federal Government, messing about with State procedural structures and operations, and that States should be left to devise their own processes, their courts and other processes, whereas there may be a different view about the substance of State law where there is otherwise a jurisdictional basis.

Now, as we say in our written testimony, it seems to be sort of up in the air, what is the nature of the class action device and class action rules and the decisional law that relates to class action issues. They may well be procedural, perhaps they are not. Maybe they are more substantive.

So, I think it is hardly an issue that one could not clearly sit here and say that this would be clearly unconstitutional, but it does raise constitutional issues.

Mr. HYDE. The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman. Ms. Acheson, I am going to talk about 2005. Under the existing law with respect to liability and durable goods, as it is now, would you agree that U.S. businesses are now at a competitive disadvantage to foreign companies because there has been a significant increase in foreign machine tool builders into the U.S. market fairly more recently, within the past 20 years, as opposed to U.S. businesses that have been selling their products out there for decades and, therefore, foreign machine tool builders do not bear the significant exposure of U.S. builders in that by passage of H.R. 2005 we would more level the playing field for U.S. businesses?

Ms. ACHESON. Well, Mr. Chabot, I don't know the answer to that, and I am in no position to dispute your representations or views in your opening statement, as to whether that is true. I don't know. It is not an area that I have studied.

I think our concern about this act is, as I have stated, that we think, again, this treads in an area that should be left to the States to determine what their policies and substantive law should be. We were concerned also about what appeared to be a one-way preemption, and you have cleared that up, although I think the language needs to be worked on.

And our final concern, for sure, is this business of individuals coming up against the 18-year period of repose and not having a period of time to, if they are injured or property is damaged, ascertain what they need to ascertain to bring an action about the piece of machinery involved.

Mr. CHABOT. You would agree, would you not, that the interstate commerce clause permits congressional action or Federal action in the area that we are proposing. It doesn't mean necessarily that we should or that it is wise that we do this—I believe it is—but what

I am asking you is, we do, under the interstate commerce clause, have the ability to act in the area that we are proposing, don't we?

Ms. ACHESON. I am assuming that the case can be made that this meets the new standards that have been clarified by the *Lopez* decision, the substantially affecting commerce test and the other elements of that, so I believe that is true, but it may well be something that somebody questions.

Mr. CHABOT. Would you agree that the transaction costs involved in litigation of this nature—legal fees, litigation costs, court costs, all the rest—really, on both sides, both the defense side and the plaintiff side, eats up a significant portion of any monies that might be available that could otherwise go to a claimant?

Ms. ACHESON. I am sorry, the transactional cost of the litigation?

Mr. CHABOT. Yes, including attorneys' fees, both defense costs and plaintiffs' costs. That would be significant. You are familiar with the types of litigation. This can oftentimes be fairly complex. The machine might have been made 40, 50 years ago. And so I would assume you would agree that the cost in this type of litigation is pretty substantial.

Ms. ACHESON. The cost of this type of litigation certainly can be substantial, whether something happens the first year after a piece of machinery is made or many years later. I am not sure of the marginal increase.

Mr. CHABOT. Let me ask you one more question because my time is running out. There was the General Aviation Revitalization Act which dealt with the aircraft industry some years ago, I believe back in 1994, and this also had an 18-year statute of repose, which our legislation doesn't touch, but it is similar. Would you agree that enactment of that law did have a pretty positive effect on the aviation industry in this country?

Ms. ACHESON. Well, again, it is not a question I have studied, but I assume that it did.

Mr. CHABOT. And it continues to be a safe industry, for the most part.

Ms. ACHESON. Again, I am not the person to be offering views in this area. I don't know much about the aviation industry.

Mr. HYDE. The gentleman's time, regretfully, has expired. The gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman. Abiding by the chairman's previous admonition to reserve some questions concerning the merits of this matter for the next panel, I am going to forego the temptation to debate the merits of our class action legislation with you, Ms. Acheson, but I would like to take this opportunity to gain from you a somewhat more complete sense of the administration's views of what we might be able to do in the Congress to address the overall problem that led to the introduction of the legislation.

I think in your Senate testimony, or perhaps in response to some of the questions that were asked, or in subsequent correspondence that you may have had with the committee following your testimony there, you made two recommendations, and I would like you to take a minute to illuminate those this morning.

One of those was that there might be an out-of-State resident opt-in provision adopted by the Congress that essentially would say

that when a State class action case is filed, that the only people who could be members of the plaintiff class would be the residents of the State in which the suit was filed, unless the residents of other States who were nominated for the class affirmatively made a decision that they would like to participate, so the burden would be placed on those out-of-State residents to opt into the class. And if that accurately states your proposal, I would appreciate your so indicating, and perhaps illuminate a bit your reasoning for recommending that.

The second recommendation that you made is that perhaps the Federal judge, when a State class action case is removed to Federal court, in instances where there is not complete diversity of the parties, should examine whether some of the parties were added just for the purpose of defeating diversity jurisdiction. And if, in fact, that accurately states one of your proposals, I would be interested in knowing what standards or criteria you believe the Federal judge should apply in making that determination.

So, with those two questions, I will turn the balance of the time to you for answers.

Ms. ACHESON. Well, in answer to the questions that Senator Grassley's subcommittee sent to us asking us other things, because we made the same point there about being concerned that the legislation in the Senate did not address the identified abuses, we did, in fact, suggest other things that might be approaches to doing that. And certainly the opt-in proposal, as you described, is one of them.

I would note that increasingly, I think, perhaps with the discussion about nationwide class actions in both Federal and State courts, judges are increasingly declining to—particularly in the State courts—to certify classes beyond their State constituents or State residents in a number of cases, and we have cited those. I don't know if that is a trend, but it seems to be a good approach.

And then the issue of the defendant who is brought in to spoil diversity, it seems to me, whether it is in a State court or a Federal court, that can be examined to determine whether or not there really is any basis, whether it is through discovery or not, to have that person in there—from the liability point of view, what actions, if any, did that person contribute to the harm that has been identified or alleged. So often the case, if you are suing a manufacturer, is that people throw in local dealers and retailers and middle persons, middle type businesses, I think, in part because they are concerned about the chain back to the manufacturer, and there may be ways to determine, if there is no basis to have the person there, to get them out, and if there is some jurisdictional or other type of procedural reason to have them there as opposed to a liability reason, there may be ways to fix that as well.

Mr. BOUCHER. So are you suggesting that even though there might be liability on the part of the retailer or the distributor who is joined as a party defendant because of his residence in the State, the presence of whom in the litigation defeats complete diversity, that we still might direct a Federal judge to evaluate whether the purpose of adding that party, even though he might have some liability, small in comparison to the target out-of-State defendant,

that the judge should be directed to examine the motivation for adding him?

Ms. ACHESON. I may have misunderstood your original question, Mr. Boucher, I apologize if I did. If there is liability, then I believe that there is no reason that we should be examining why that person is there. Or if there is, in fact, an allegation and it is colorable and rule 11 standards are met, then there is no reason to dismiss if, for example, a piece of the machinery was changed or replaced or some kind of additional warranty or something was put on it. But as I had understood the gravamen of the allegation, you referred to people who really didn't do anything but happened to be the local dealer—even if the car, for example, wasn't bought from that person—were brought in simply to destroy diversity, and it is those types of cases that we were concerned about.

Mr. BOUCHER. But under the joint and several liability provisions, those dealers and retailers tend to be liable, don't they? It has been a long time since I tried a product liability case, but my recollection is that anybody in the chain of distribution has an element of liability.

So, with that understanding, I am still struggling a bit to form in my mind a hypothetical to which we could apply your test of a person being added solely for the purpose of destroying diversity jurisdiction. If the party doesn't have any liability, he would get out on a preliminary motion of some sort, to begin with. So, give me, if you would, a hypothetical to which this would apply.

Mr. HYDE. Well, I have to intervene, if you don't mind, Mr. Boucher. Your sorites into complexity outdistanced the brevity that you sort of promised.

Mr. BOUCHER. My apologies, Mr. Chairman. Could I simply ask Ms. Acheson if perhaps in a written response, she could give us an example to which your test might apply.

Ms. ACHESON. I would be happy to provide that.

Mr. BOUCHER. Thank you.

[The information referred to follows:]

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, July 27, 1999.

Hon. RICK BOUCHER,
House of Representatives, Washington, DC.

DEAR DEAR REPRESENTATIVE BOUCHER: On July 21, 1999, Assistant Attorney General Eleanor D. Acheson appeared before the House Judiciary Committee to testify on two civil reform bills—H.R. 1875, the Interstate Class Action Jurisdiction Act of 1999, and H.R. 2005, the Workplace Goods Job Growth and Competitiveness Act of 1999.

During questioning following her oral testimony, you asked her to specify under what circumstances it would be proper for a Federal judge to dismiss from a class action a non-diverse defendant who had been joined by the class plaintiffs solely for the purpose of precluding Federal diversity jurisdiction. In particular, you asked whether it would be proper for a Federal judge to dismiss from suit a local car dealer who might be liable to the class plaintiffs under a theory of joint and several liability, if that dealer is not a primary defendant and was named in the action solely to defeat diversity jurisdiction and keep the action in State court.

In the Department's view of the rules regarding fraudulent joinder, it is proper for a Federal judge to dismiss a non-diverse defendant from a class action if the plaintiffs cannot state claims for relief or have no reasonable likelihood of success on their claims against that defendant. However, if the class plaintiffs have a viable claim against a non-diverse defendant that would withstand a motion to dismiss and that involves the same events as the claims against the primary defendants,

the non-diverse party is properly joined and should not be dismissed simply because the plaintiffs also hoped to defeat diversity in naming that defendant in the action. A plaintiff's intent alone should not extinguish an otherwise actionable claim.

Applying these principles to your hypothetical question, it would be improper for the Federal judge to dismiss the local car dealer assuming, as the question does, that the plaintiffs have a viable claim against the dealer. However, in several cases, we understand that class plaintiffs have fraudulently joined non-diverse parties against whom they have no colorable claim at all—when, for instance, they join the local car dealer but actually purchased their automobiles from out-of-State dealers. Proper scrutiny of claims of fraudulent joinder in considering removal notices should end this practice.

If you have any further questions, please do not hesitate?to call upon us. The Office of management and Budget has advised us that from the perspective of the administration's program, there is no objection to submission of this letter.

Sincerely,

JON P. JENNINGS, *Acting Assistant Attorney General.*

Mr. HYDE. Thank you. The gentleman from Indiana, Mr. Pease.

Mr. PEASE. Ms. Acheson, in your opening remarks you set up and then knocked down, I think, six issues that you said were advocated by the proponents of the legislation as reasons for the legislation. Most of those—my words, not yours—dealt with alleged inefficiency or bias or ineptness of State courts.

I didn't hear either Mr. Boucher or Mr. Goodlatte advance those as reasons for the legislation, but even if they did, I don't accept that as a concern that would prompt this legislation.

What I am concerned about, aside from the specifics of the bill, is just the general subject of judicial economy and efficiency, and am curious as to how you would respond to the situation that can obtain where there are the same parties, plaintiff and defendant, the same issues being litigated in class action cases in a dozen jurisdictions simultaneously. And how that advances public policy, how that provides any benefit either for plaintiffs or defendants, and how that impacts on the issue of judicial economy and efficiency. Judicial, I mean in a collective sense, State and Federal, collectively.

Ms. ACHESON. Well, I think it is an excellent question, and it is easy to think, well, gee, a bunch of different cases in different courts, that doesn't make any sense, we should just throw them all in the Federal court. But it seems to me that is not the consideration.

We are dealing with two separate sets of governments that have been there for a long, long period of time, to provide justice in different kinds of contexts and situations—the Federal courts, those prescribed by Congress, and the State courts, those prescribed by their State legislatures and arising under the common law and the decisional law of the State supreme courts. And those courts have thousands of courts, thousands of judges, compared to 94 judicial districts and 844 article III judges.

So you start with a much more resource-intense system in the State system. And in our federalistic system, we must be mindful of the role of the States and the fact that most of the law we are talking about is law that arises, in one way or another, from the common law and is developed in the State law context.

It seems to me that our Federal system erects a presumption about where these cases should be and who should decide them. They should be in the State courts and they should be decided by State judges, unless there are really extraordinary circumstances

that require those cases, for some national set of reasons, to be in the Federal court.

So, it is easy to think, well, there is a State judge down the block that maybe doesn't have a law clerk or maybe only one or two, or it is a small courthouse and these people get kind of overwhelmed, and that is true in some locales of the country, but increasingly State courts, particularly the trial courts of general jurisdiction, are large. They have many judges. They have law clerks. They have a sophisticated Clerk's Office. They have electronic means of communication. They work well through the Conference of Chief Justices and the National Center for State Courts. They have apparatuses, interstate compacts, full faith and credit, and just their common sense and reasonable ability to deal with judges and other States to consolidate discovery. There are other types of legal doctrines, estoppel, and decisions about pieces of evidence and so forth that, if the parties are the same, can be used from one court to another, and this has been done for a hundred years of litigation, ever since the Industrial Revolution has sort of developed this set of cases, whether it is personal injury, products liability, whatever you want to call it. And I think what we are concerned about—and I would say the development of class action is sort of the same thing—is this thought that, for some reason, great efficiencies are achieved moving these cases out of State courts which have done, by and large, extremely well with these cases.

Mr. HYDE. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you. Ms. Acheson, do you have any sense of the number of cases that would be barred if this were to pass, and a general description of what kind of cases we are talking about?

Ms. ACHESON. A number of cases that would be barred?

Mr. SCOTT. Are many cases being brought after 18 years, is this a problem? Some cases would be—what are we talking about?

Ms. ACHESON. I apologize. I was thinking about the class action——

Mr. SCOTT. I'm sorry—H.R. 2005.

Ms. ACHESON. I don't know, Mr. Scott, in answer to your question.

Mr. SCOTT. On page 2 of the bill, they exclude toxic harm. Would toxic harm include asbestos, harm caused by asbestos?

Ms. ACHESON. In our view, it certainly would.

Mr. SCOTT. You indicated the problem with the statute of limitations and the statute of repose, that you could have an injury right before the deadline. Do most States have a difference between the statute of repose and the statute of limitations—that is that the injury has to occur within the statute of repose period, and then the case can be brought within the subsequent statute of limitations? Is that how most States deal with that problem?

Ms. ACHESON. I don't know about most States, but I think many States—and if I am remembering correctly, I think in the last Congress when this proposal was part of a bigger bill—there was sort of a fail-safe where something happens to somebody very close to the end of the repose period and the statute of limitations for that particular case would carry their right to bring an action beyond the statute of repose. State legislatures have recognized there to be a problem in this context and have dealt with it in various ways.

Some say that the response period should carry to the end of the statute of limitations, others create sort of a fail-safe period, so that you are not barred for some reasonable period of time after ascertaining the things you need to know to bring a lawsuit or make a claim.

Mr. SCOTT. Thank you. Does the Department of Justice have a concern about all these cases being shifted to Federal court in addition to the criminal laws we have been passing? In Richmond, we are trying routine gun cases in Federal court, and judges have complained that it is looking more and more like just a police court rather than a Federal court. Are you concerned about the capacity of the Federal court system, particularly in light of the vacancies that exist, in being able to handle all these cases without creating a backlog?

Ms. ACHESON. I think we are very concerned about that, and concerned about the fact that the people who will suffer because of this certainly are not the people involved in the criminal cases because of the Speedy Trial Act. It will be the people who are involved in these civil actions, particularly in class actions, because they will be more difficult to manage, and Federal judges, in light of their small number and the kinds of issues the Chief Justices will raise, will get to them last. And those people will wait a very long time for justice.

Mr. SCOTT. One final question. In your testimony, you indicate due process and federalism concerns. What are the issues worth studying under the umbrella of due process and federalism?

Ms. ACHESON. In the context of which bill?

Mr. SCOTT. H.R. 2005—I'm sorry.

Ms. ACHESON. I think the main issues to study are the loss of action, and this business about having an action before the end of the statute of repose, but not having an opportunity to bring it.

Mr. SCOTT. Are there other due process—at the end of your testimony, due process and federalism concerns?

Ms. ACHESON. Well, there are certainly the issues about whether or not this shouldn't be left up to States to determine their own policies in this regard, absolutely.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. HYDE. Thank you. Before the last three questioners, the Chair will ask a couple of questions. As I have listened to your testimony, Ms. Acheson, you have talked about efficiencies, availability to the court by plaintiffs, and all of those very real problems that have to be resolved in this legislation. What I haven't heard is, it seems to me, one of the real reasons for this legislation, and that is the quality of justice that you get in the Federal court as against the State court.

Now, I am horribly generalizing. There are exceptions. Believe me, there are Federal courts where you don't get a fair shake and there are State courts where you don't get a fair shake and vice-versa. But it is a fact that State court judges run for re-election, and the plaintiffs' bar has a relationship with those judges, of necessity—of necessity—because sometimes it costs money to run for public office. That is fine, that is the American way.

But your Federal judges, increasingly, normally, are supposed to be divorced from the at least electoral politics where they need to

thump for campaign funds. They are, many times, selected by a committee of academics and other judges and lawyers, Senators then recommend them, they get nominated, they get confirmed, but the whole panoply, the whole atmosphere, is to remove these folks from the political swamps.

And it seems to me—again, all things being equal—and that is maybe the hardest part—wanting to get a complicated case involving lots of plaintiffs and lots of money into a Federal court, as distinguished from a State court, may have unstated, perhaps, the search for a better level—and I am not expressing this very well because I don't want to denigrate State courts—but it is a fact that the judge has to run for re-election in most State courts whereas in the Federal court he does not, and that is a limitation on one's autonomy. Now, I should have saved that for Mr. Wolfman, of Public Citizen, who I am sure thinks money and campaigns is not a good thing, but that is a brooding omnipresence over this question, seems to me. Do you have a comment?

Ms. ACHESON. Well, I will leave the answer about money and campaigns to Mr. Wolfman. It seems to me that the sort of point that you made, or——

Mr. HYDE. I am probably doing you a favor by not asking for an answer because——

Ms. ACHESON. The phrase that you used, "all things being equal," I think one of the sort of points we are trying to make about the Federal structure here is that, in fact, we don't start from a point where all things are equal. The sort of operating premise for all of us, legislative choices, executive action discretion, should be "is this a place the Federal Government needs to be," because there needs to be a very——

Mr. HYDE. Is justice better served by this litigation being in a Federal court than in the State court? I would ask that question, rather than is this where it needs to be, but maybe it is the same question, just differently stated.

Ms. ACHESON. Well, I think, my own view and the view of the Department, to the extent we have looked at the reports of other people who have studied the matter, is that justice is served in State courts. Now, the State I come from does not have elected judges, so there I have not confronted this, but I have tried cases in other States that do have elected judges, and I understand the concern. But I think that judges, no matter how they got there, by and large, try very hard to do the right thing and manage cases efficiently and fairly. There are certainly exceptions, but the thing that gets around sooner than anything else is if a judge is not fair—or worse than that, corrupt—and I think, all in all, there is justice in the State courts, even for——

Mr. HYDE. I share the same bias that you have expressed toward honor and integrity, regardless of whether they have to run for office or not, but it is just an element, I think, that can be put into the equation.

Mr. FRANK. Mr. Chairman, would you yield to me for 15 seconds?

Mr. HYDE. Sure.

Mr. FRANK. I just want to thank you for that, and I mean this quite seriously, I am going to get the transcript of that, and the next time some of our colleagues rail against the unelected Federal

judges interfering with the rights of the States, I will read it to them, with appropriate expression.

Mr. HYDE. Well, I hope so, and I hope you give me credit. I hope you give me credit.

Mr. FRANK. Oh, I will lead with credit for you, Mr. Chairman. [Laughter]

Mr. HYDE. Very good. The gentlelady from California.

Ms. LOFGREN. Thank you, Mr. Chairman. I will also give the chairman credit because I am mindful of his comments in the 104th Congress, in the context of our habeas corpus discussion, when the chairman said, "I simply say the State judge went to the same law school, studied the same law, passed the same bar examination that the Federal judge did, the only difference is the Federal judge was better politically connected and became a Federal judge, but I would suggest when the judge raises his hand, State court or Federal court, they swear to defend the U.S. Constitution, and it is wrong, it is unfair to assume ipso facto that a State judge is going to be less sensitive to the law, less scholarly in his or her decision, than a Federal judge." That was in 1996. And I wonder, really, whether the only thing that has changed in the 3 years since is the backlog that has occurred by not having approved additional judges, and that is a question I wanted to ask you, Ms. Acheson, in terms of your responsibilities as to judicial nominations.

I am advised—and this is a question, not a statement—that in the ninth circuit, 1 year ago, that oral arguments had to be postponed in 600 civil cases because of the backlog. The judicial vacancies that have been building up, combined with the backlog of civil cases, and the increasing federalization of criminal law is eating into the ability of the ninth circuit to deal with their judicial civil load.

It is also worthy of remark that we got a letter from the Conference of Chief Justices. I won't read the whole thing but the Chief Justices say that "we believe that H.R. 1875, in its present form, is an unwarranted incursion on the principles of judicial federalism underlying our system of government. It would unilaterally transfer jurisdiction of a significant category of cases from State to Federal courts. So drastic a distortion and disruption of traditional notions of judicial federalism is not justified absent clear evidence of the inability of the State judicial systems to process and decide class actions in a fair and impartial manner and in a timely fashion." The Chief Justices make other additional comment.

It seems to me that if we want to look at judicial efficiency in the ninth circuit, for example—and I think it is not unique to even deal with their civil calendar—that the points made by the Chief Justices of the State supreme courts might also be made by the Federal judiciary, and I am wondering if you have a comment on this entire subject matter?

Ms. ACHESON. Well, I think that you point to an impact on the Federal courts that will be very real, if this bill were to pass, and anybody, plaintiff or defendant, could remove class actions meeting the requirements of the bill to the Federal courts. I think the Federal courts would be significantly challenged to manage this litigation and, as I have said earlier, not only would it be a challenge to fit in with their other responsibilities, particularly given the va-

cancies, but these cases would fit in not on an equal basis but, in fact, last. And you are right about the vacancies. The ninth circuit and the second circuit had to defer arguments in several hundred cases for a good part of last year.

Ms. LOFGREN. My light is on, so I want to just make one more comment before my time is up, and that has to do with the issue that has been raised by some, relative to the extraordinary remedies provided under the Y2K threat of massive litigation. And there have been some other very narrowly crafted issues that we have dealt with on a bipartisan basis.

When we were able to come together on a bipartisan basis on that bill, now law, many of us pointed out that extraordinary bill should not be used as any precedent, especialy not to overthrow our Federal system of civil justice devised so carefully over 200 years ago. I feel very strongly that we should not be prevented or feel constrained from coming up with narrowly crafted and creative approaches to those odd or unique situations that arise because some will then try to use some exceptional application as an excuse to overturn civil law in America. I, for one, will not follow that path.

As you can tell by my comments and questions, I am enormously skeptical about this proposal. I am trying to be fair-minded and to listen. And your testimony has been enormously helpful in reaching an understanding of the wisdom, or lack thereof, for proceeding with this bill. My time is up, and I would yield back the balance of my time. Thank you, Ms. Acheson, for your attendance here.

Mr. GOODLATTE [presiding]. Thank you. The gentlewoman from Texas is recognized.

Ms. JACKSON LEE. I thank the chairman very much, and I think it is important to emphasize that what this room stands for is the balance of justice. It is the Judiciary Room. There have been many successes in expanding the rights of individuals who have had limited rights, and I would hope that we would also balance those rights for all aspects of our citizenry. So that includes business community, proponents of this legislation, and opponents. And I am delighted that we have called this hearing, and I am delighted that you are still here. And I apologize for being detained on the Floor for questions that I am getting ready to pose. I just wanted, for my clarification and, of course, just for the record in terms of my posing the question.

My understanding, Attorney General Acheson, is that the Justice Department is opposed to both H.R. 1875 and H.R. 2005. Is that my understanding?

Ms. ACHESON. That is correct.

Ms. JACKSON LEE. Then let me raise several points that have been emphasized, but if I might have you comment on them. One, I thought we all had read just a year or two ago, Justice Rehnquist's eloquent statement—and I hope it was not denunciation—of no more federalized laws, if you will; no more robbing from the State and putting them in the Federal system. And I don't think it was from a position of self-importance as much as it was from a position of the wheels of justice. And so I am concerned about what both these bills will do to the wheels of justice, because I heard my esteemed chairman suggest otherwise, that, in fact, maybe we will have a better quality of justice by these two pieces

of legislation. I am going to ask a series of questions—so that one is of concern to me, particularly—if I might use my State as a laboratory of one of the points that the chairman has made.

We have been working very hard in Texas to go to an appointment system for our State elected judges. I want to go on record, having to go back to my State, to indicate we have a very fine State judiciary. But I will note to you that in the course of electing judges, we have had a turn—I think it would be a turn where the business community would be celebrating—and that is enormous support for their issues, such that you could pretty much find most defense bar personnel prevailing. This is not to suggest that there is not fairness in our State courts, but there are cycles. And so I don't think we should attribute State courts to the plaintiff bar or the defense bar. Some are pro-defense, based upon their political leanings.

I would like you also to further expand on the resource issue. We have so many vacancies. You have already said that the State court system is much larger and, in fact, I don't see how in the world we are going to handle either of these new initiatives.

I also want to clarify the record because I think you are pretty much battered around about Y2K, about H.R. 775, which was signed yesterday. One, I think it is important to know that the administration's involvement made it a better bill and, two, there is a sunset provision on it. There is none on these, to my understanding.

And let me quickly end by saying I believe these bills extinguish rights, both of them. It keeps you out of State court and it denies you the ability to bring a case for a durable good—gun manufacturers, tobacco lawsuit. Would you expand on those inquiries, as I have asked them, and I appreciate very much your presence here today.

Ms. ACHESON. Thank you. I will try and do it very briefly. I think that you are exactly right, that Chief Justice Rehnquist was very concerned about the federalism aspects of the trend to move more criminal cases into the Federal courts. There would be no difference, it seems to me, moving civil cases into the Federal courts. I think he also had a concern, and we should share it, about resources. We are now beginning to pick up some steam, but for some period of time there has been no action to deal with the approximately 60-plus vacancies all across the country, many of them in very busy trial courts, that would be the very places these, the class actions at least, would go to.

I think the administration/the Department shares your view about access to justice. I think that we are concerned that not only would people miss the opportunity to go into their State courts when they have a right to go to their State courts and have their cases be dealt with under State law with State judges, but there are big challenges to going to Federal courts, such as increased expense, and there will be issues/rights that will be lost in the transfer, particularly given the issues about the remanding back and the absence of protection for the running of the statute of limitations.

There are also the points that I tried to make clear in my testimony, that not one of the issues that have been raised about the problems with class actions will be solved ipso facto by going to

Federal court. There is nothing magical about Federal court or Federal judges, in and of themselves, that will fix the problems that have been raised. And that is an issue, too. There would be a lot of dislocation for very little net result, in our view.

Ms. JACKSON LEE. My light is on. Do you believe this to be extinguishing rights of access to the court——

Ms. ACHESON. I am sorry if I was unclear about that. I believe that that is a possible result, and one that we should be concerned about.

Ms. JACKSON LEE. I thank the chairman, and thank you.

Mr. GOODLATTE. Thank you. The gentleman from Massachusetts.

Mr. DELAHUNT. Welcome, Assistant Attorney General Acheson. I concur with your arguments about federalism, and it was clear that Chief Justice Rehnquist did, in his State of the Judiciary remarks, address both the federalism issue and the resources issue. And I would like to just focus on the issue of resources for a moment.

In your capacity as an Assistant Attorney General, can you provide us with any information as to the existing backlog of civil cases? Are there any trend lines? Is there any data that would establish what is happening in the Federal courts that we should be aware of in terms of this resource issue?

Ms. ACHESON. I will do my best with what I know now. There is no question that overall in the Federal system, civil case filings are rising, and the same is true with the appellate filings overall in the circuit courts.

We have had episodic periods in the last several years, particularly in the period in that 6, 7-year time, when there have been substantial backlogs. We had another cycle of that at the end of last year and the beginning of this year.

There are district courts which have virtually suspended civil proceedings because the courts are relatively small and they are missing judges, and, while nominations have been pending, we have not had hearings. We are now beginning to have hearings. We hope for progress, and we hope that we can fill particularly the most aggravated of these vacancies, those that are called "judicial emergency" vacancies, those where a seat has been vacant for over 18 months.

Mr. DELAHUNT. But presuming that these vacancies were filled, in your opinion, would there then exist adequate resources to deal with the increasing and the expanding civil jurisdiction, absent the class action issue, that the Federal court must deal with now? Do we have any data that would indicate the time it takes from the date of filing to the date the case is finally disposed of in a civil suit?

Ms. ACHESON. There is such data. Off the top of my head, I don't know it, but there are very few jurisdictions in the Federal system where you can get a case disposed of, with the exception of something like the "Rocket Docket" in the Eastern District of Virginia. There are a few of those around the Nation, however, when a case is disposed of in less than 18 months. The typical period extends out to, in many jurisdictions, 6 years, 7 years, and that is assuming the court is at full capacity. And, unfortunately, in Massachusetts we have had some experience of long, long delay in the civil side, notwithstanding a full court, virtually the entire last 20-30 years,

whatever it has been. But there are data which show that it still takes a long time to get a civil trial in most districts, and certainly if these class actions were all to be removable to Federal court, we would have a serious problem.

Mr. DELAHUNT. Thank you, that is the only question I have. I yield back.

Mr. GOODLATTE. I thank the gentleman. Ms. Acheson, we thank you very much for your contribution today, and I think there have been some requests for some written answers, and we will hold the record open for a week to allow you time to submit the answers to those written questions, and any others that may be submitted to you.

Ms. ACHESON. We will provide them. Thank you very much.

Mr. GOODLATTE. Thank you.

Mr. GOODLATTE. Our next panel comprises two groups of witnesses. The first group on this panel will testify exclusively on H.R. 1875, the Interstate Class Action Jurisdiction Act. We are honored to have as our lead-off witness, former Attorney General Griffin Bell. Judge Bell served as President Carter's Attorney General from 1977 to 1979. Judge Bell had previously served on the United States Court of Appeals for the Fifth Circuit, and was a director of the Federal Judicial Center. He is currently a senior partner in the law firm of King and Spalding.

We are equally pleased to have with us Walter Dellinger, former Assistant Attorney General for the Office of Legal Counsel, and Acting Solicitor General. Professor Dellinger is currently the Douglas B. Maggs Professor of Law at Duke University, as well as a practicing attorney.

Brian Wolfman is a staff attorney with Public Citizen Litigation Group, a nonprofit national public interest law firm which serves as the litigating arm of Public Citizen. Mr. Wolfman is the co-author of several articles on the problems they have encountered in class action settlements.

Gay Struve appears before us as the Chair of the Committee on Federal Courts of the Association of the Bar of the City of New York. He is a partner in the firm of Davis, Polk and Wardwell.

Don Elliott is a practicing attorney and an adjunct professor at Yale Law School, who specializes in teaching complex litigation, class action and constitutional law. Mr. Elliott served as assistant administrator and general counsel to the Environmental Protection Agency from 1989 to 1991.

Professor Richard Daynard is a professor at the Northeastern University School of Law, and also serves as chairman of the Tobacco Control Resource Center's Tobacco Liability Project.

John Beisner is a partner in the firm of O'Melveny & Myers, and an expert in class action litigation. He has defended over 250 class action lawsuits in State and Federal court.

The remaining three panel members will testify on H.R. 2005, the Workplace Goods Job Growth and Competitiveness Act of 1999. First, we will hear from Jim Mack, vice president for government relations of AMT, the Association for Manufacturing Technology. AMT is a trade association whose membership represents over 370 machine tool building firms with locations throughout the United States.

Following Mr. Mack will be Mr. Thomas Bantle, legislative counsel for Public Citizen's Congress Watch.

Our final panelist will be Sam Bleicher, who appears on behalf of the Coalition for Uniform Product Liability Law, an organization comprised of almost 100 manufacturers.

We have a vote pending, and——

Mr. FRANK. Mr. Chairman, first, a parliamentary inquiry. Do we have any procedures for certifying witnesses as a class—it might save some time. [Laughter]

Mr. GOODLATTE. I thank the gentleman for a very cogent suggestion, especially since they have all been removed to Federal jurisdiction here.

We have three votes, and we are going to be delayed coming back. So we will try to reconvene at 1 o'clock, or as soon thereafter as we complete those votes. The committee will stand in recess.

[Recess]

Mr. PEASE [presiding]. The committee is reconvened. My apologies to the members of this panel who waited a long time this morning, and then had to wait again as we went to the Floor, but we appreciate very much your presence and your presentations, and we will begin with Judge Bell.

STATEMENT OF GRIFFIN B. BELL, FORMER ATTORNEY GENERAL

Mr. BELL. Thank you, Mr. Chairman, members of the committee. I have filed a statement of my testimony, so I will restrict my remarks to a few observations.

Number one, this bill, as I read it, is very much in keeping with what the Congress did in the 1st Congress in 1791, when it created the diversity jurisdiction. This is an extension of it. At that time, probably no one had ever heard of a class action, and I think we could assume if the Founding Fathers had so much interest in diversity and giving the nonresident citizen the benefit of the Federal courts, they would have done something about class actions as well to protect those people in the class who do not live in the State where the case is brought. That is what this is really all about.

Well, State courts can reach out and drag in people from the 49 other States through something of a fantasy called "Notice by Publication." So, that is what this is about.

I guess this all falls under the heading of "due process concerns." I have always thought that the only real way you could have due process in a class action would be to have an opt in requirement—not opt out, but opt in. It is a fantasy to think that a court in south Georgia could handle a case and include somebody in Alaska or Hawaii in the class, and act as if they are present and that they know their rights, and that they can be included, unless they write to the court or notify the court that they want to get out. That is so unbelievable, but the Supreme Court upheld that years ago in a case in Kansas, so we can't change that law. Congress can, but as long as it is on the books it is the law.

The second thing is that I think that the Justice Department takes the position that this in some way takes a right away from the citizens of the State. This bill is designed to take care of the nonresidents of the State, not the citizens of the State, and the

lawyers for the citizens of the State could bring a suit without including people in other States. So, that is a strange argument.

The other observation I would have is that the law may be different in the other States, so one State judge is imposing his view of what the law ought to be in the other 49 States, although it might not be what he thinks it ought to be, and that is a very bad thing. They have differences in proof of fraud, or statute of limitations, all sorts of things.

The fifth circuit had the cigarette case called *Castano*, and those arguments were made in a district court to no avail, and then the fifth circuit reversed on that ground, that the law was so different that it didn't lend itself to a class action beyond the State lines. That is sort of what this is.

I think that the argument that this will somehow overwhelm the Federal courts is not true. As the chairman may know, I have 14½ years as a Federal judge, and I guess in every way I am a Federal court man, but our courts in the Southeast are not overloaded. You can get a trial within a reasonable time, and they handle class actions. Some of them certify the class actions, it seems like, as easily as maybe some of the State judges do, but they handle them, and I think they could easily take on these extra cases.

There is one thing about the bill that bothers me, and that is section (f), the very last provision in the bill, because it seems like it sets up a revolving door. The Federal judge makes the decision that you can't have a class action, and then it is remanded to the State court and the State court may or may not agree with the Federal court, and so then you could remove it again, but I don't know if you can remove it after you wait until the State court decides. That is a problem.

A second thing is, maybe the State law is different from the Federal law on class actions. That is true in some States. Of course, you could have a restatement of the complaint and leave out the nonresidents, maybe you could do that, but that is unclear. I have something in my testimony about that. That needs to be made clear because the decision of the Federal court on the same facts ought to be res adjudicata. You ought not to have a law based on "heads, I win; tails, you lose." So you go over to the Federal court, you win, and then you haven't won anything, but you have spent a lot of money and time in the Federal court. So, that needs to be corrected. Other than that, I think this is a very good bill. It is needed, and it is much in keeping with protecting interstate commerce, which is why we have a country now. Our country was founded because the States were interfering with commerce. And the first meeting was to decide to have a Constitutional Convention because the States were doing that. We had to have one Nation. And Federal courts are a part of being one Nation. And if it is citizens of different States involved, you ought to be able to go to the Federal courts. Thank you.

[The prepared statement of Judge Bell follows:]

PREPARED STATEMENT OF GRIFFIN B. BELL, FORMER ATTORNEY GENERAL

Thank you for the opportunity to appear before this Committee today to discuss what I believe is very important legislation that would alleviate serious problems in our civil justice system.

As one who has observed our judicial system from several vantage points—as the Attorney General of the United States, as a federal appellate court judge, and now once again as a private practitioner—I can say without hesitation that class actions have become a prominent element of our legal system over the last thirty years. I can further say that in many respects, that is not a positive development. My concerns about class actions are numerous, but three issues predominate:

First, class actions are being used in circumstances never contemplated by the persons who created the modem version of the device in 1966 by adopting the current version of Rule 23 of the Federal Rules of Civil Procedure. I strongly believe that the crafters of that rule simply did not envision that class actions would be used as pervasively as they are today, particularly in our state courts. Rule 23 was intended to create a device for aiding resolution of claims that people have actually brought or genuinely wish to assert. Unfortunately, class actions are now used by attorneys to build lawsuits where none would otherwise exist. Please do not take seriously any suggestion that class actions normally originate when an injured party seeks out an attorney and asks for assistance in obtaining a remedy. Attorneys usually "develop" the concept for a claim and then search for a plaintiff to fit the mold.

Second, most class actions are too broad. Class action lawyers try to define their cases to cover as many claims and claimants as possible. Bigger classes give attorneys far more leverage against defendants and create the potential for more substantial attorneys' fees. The problem is that these bigger classes almost invariably proceed on a "lowest common denominator" basis. The "average" claim becomes the claim by which all claims in the purported class are judged; class members with larger, more serious claims get lost in the crowd, seldom receiving the individualized attention they deserve. This concern has driven federal courts—including the U.S. Supreme Court—to examine more carefully whether proposed classes are as homogenous (and therefore as worthy of class certification) as counsel represent.

Third, attorneys' fees are a driving force behind many of the class actions. I have no problem with attorneys being paid for their work. I do not think well of the windfall approach to fees. In the current environment, attorneys too often succeed in receiving fees that vastly exceed the level of benefits that they have actually obtained for the class members they supposedly represent. In too many cases, courts award class attorneys millions in fees, but their class member clients get little or nothing.

So what is the solution? Some among us might argue quite persuasively that we should simply abolish class actions altogether—that we should heed the U.S. Supreme Court's general admonition that claims normally should be litigated individually.[1] Others might urge that the usage of class actions or the fees that they generate should be restricted by legislation. In short, I suspect that myriad approaches to solving these problems could be developed.

Experience has taught me, however, that more modest, less disruptive solutions are often the best. Simplicity is a virtue. That is why I wish to add my voice to those supporting H.R. 1875. Without turning the class action world upside down, it is a step toward alleviating one problem with class actions. Indeed, it simply corrects what I see as a flaw or oversight in our current federal jurisdictional statutes—the fact that large interstate class actions are generally not allowed into federal courts. That point was eloquently stated in a recent opinion written by Judge Anthony Scirica of the U.S. Court of Appeals for the Third Circuit, who also chairs the Judicial Conference's Standing Committee on Rules and Procedure:

> From a policy standpoint, it can be argued that national (interstate) class actions are the paradigm for federal diversity jurisdiction because, in a constitutional sense, they implicate interstate commerce, foreclose discrimination by a local state, and tend to guard against any bias against interstate enterprises.[2]

H.R. 1875 would correct this illogical gap in our current federal jurisdictional statutes by allowing more large, interstate class actions into federal court.

I have read with great interest recent statements by the Department of Justice concerning the concept of expanding federal diversity-of-citizenship jurisdiction over class actions. In its prepared statement for the May 4, 1999 hearing before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary on S. 353 (a Senate bill that contains similar provisions expanding federal diversity-of-citizenship jurisdiction over class actions), the Department suggested that when a state law-based lawsuit originally filed in state court is removed to federal court, the state is somehow denied its right to address the controversy. (Pages 2, 5.) The Department appears to reject the concept that a "lawsuit brought

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[1] *See, e.g., California* v. *Yamasaki*, 442 U.S. 684 (1979).

[2] *See In re Producential Insurance Co. America Sales Practice Litig.*, 148 F.3d 283, 305 (3d Cir. 1998).

under State law concerning a corporation's operations within the State would be removable to federal court." (Page 6.) But that is precisely what diversity-of-citizenship jurisdiction is supposed to be. It is a mechanism by which state law-based claims asserted in a state court may be moved from that local court to a federal district court so as to ensure that all parties (including a non-citizen corporation defendant that does business in the state) may litigate in a fair forum with interstate commerce interests protected.[3] Congress didn't suddenly dream up this concept. Nor is it a judicial concoction. Federal diversity-of-citizenship jurisdiction was established by our framers in Article III of the Constitution.

Diversity-of-citizenship jurisdiction was established, *inter alia*, to ensure that local biases against commercial enterprises would not create a climate that would stymie interstate expansion of commercial and manufacturing interests and thereby undermine the forging of a national union.[4] The framers correctly envisioned the evolution of a nation with large commercial enterprises spanning may states—a desirable goal that they believed would be threatened by local courts that might be hostile to such entities.

Because diversity-of-citizenship jurisdiction was created, a corporation based in one state that begins conducting business in another state will not subject itself to the exclusive jurisdiction of the local courts in that state in the event that litigation arises there. The creators of our Constitution thought it important that there be a fair, uniform, and efficient forum (that is, a federal court) for adjudicating interstate commercial disputes, so as to create an environment that would nurture commercial expansion.[5]

In sum, those who formed this national union created diversity-of-citizenship for one very clear reason—to protect businesses against local court biases in big, interstate cases. In short, if interstate class actions had been around at that time that the Constitution was forged, I suspect that such cases would have been the paradigm for cases that would be subject to federal diversity-of-citizenship jurisdiction.

I have heard some persons protest that enactment of H.R. 1875 would overload our federal courts. Set against the historical background that I just outlined, that is a wholly unpersuasive argument against this legislation. Concerns about resources cannot justify our ignoring a constitutional mandate, particularly when the current diversity-of-jurisdiction rules burden our federal courts with cases that are less important, touch fewer citizens, and are not within the ambit of the concerns that prompted establishment of the diversity-of-citizenship jurisdiction concept in the first place.

For all of the reasons I set forth previously, Article III of the Constitution dictates that parties to such cases should be able to demand that they be heard by a federal court. Because of their interstate quality, those cases have a federal character. Several additional reasons, however, strongly indicate that even if these constitutional considerations did not exist, federal courts would be better positioned to meet the challenges presently by these uniquely complex cases:

- Resources available to federal courts are typically more plentiful than those available to the state courts.
- Federal court judges typically have more experience with complex litigation matters (like class actions) than do many state court judges (particularly judges of general jurisdiction courts located in smaller communities, where many interstate class actions are filed).
- In the interest of efficiency and consistency, federal courts are authorized to consolidate before a single judge any similar class actions that are filed around the country (including class actions that assert the same claims on be-

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[3] *See Pease* v. *Peck*, 59 U.S. (18 How.) 518,520 (1856) ("The theory upon which jurisdiction is conferred on a [federal] court . . ., in controversies between citizens of different states, has its foundation in the supposition that, possibly, the state tribunal might not be impartial between their own citizens and foreigners.").

[4] *See* James William Moor & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 Tex. L. Rev. 1, 16 (1964). *See also Bank of United States* v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.) ("However true the fact may be, that tribunals of the states will administer justice as impartially as those of the nation, to the parties of every description, it is not less true that the Constitution itself . . . entertains apprehensions of the subject . . ., that it has established national tribunals for the decision of controversies between . . . citizens of different states.").

[5] "No power exercised under the Constitution . . . had greater influence in melding these United States into a single nation [than diversity-of-citizenship jurisdiction]; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into various parts of the Union, and nothing has been so potent in sustaining the public credit and the sanctity of private contracts." John J. Parker, *The Federal Constitution and Recent Attacks Upon It*, 18 A.B.A. J. 433, 437 (1932).

half of the same classes of persons). *See* 28 U.S.C. §1407. State courts lack such interstate consolidation authority and therefore must engage in the wasteful (and often counterproductive) exercise of separately handling such overlapping cases.

- In most state law-based class actions, the proposed classes encompass residents of multiple states. Thus, the trial court—regardless of whether it is a federal or state court—must make the necessary choice-of-law decisions and then interpret and apply the laws of multiple jurisdictions. Because of their more ample resources, federal courts are better equipped to handle that important task.
- In this same vein, if a proceeding requires that a court interpret the laws of various states (which is almost invariably necessary in an interstate class action), it is more appropriate for a federal court to undertake that task. Such work is inherently part of what the constitutional concept of diversity-of-citizenship jurisdiction is about and is preferable to having state courts routinely dictating to other states (to which they have no accountability) what their laws mean. In short, why should a state court judge in Georgia be telling the state of Massachusetts (and its citizens) what its laws mean? These matters should be handled by federal judges, who are appointed by the President (elected by all citizens) and confirmed by the Senate (representing all citizens).
- Similarly, in interstate class actions, state courts are often called upon to resolve the claims of residents of multiple other states against a defendant based in yet another jurisdiction. Why should a Florida court be resolving the claims of Texas residents against a California-based company? Diversity-of-citizenship jurisdiction was designed to get these sorts of disputes into federal courts.

Let me also note my belief that the predictions that this legislation will cause our federal courts to become overwhelmed with class actions are off the mark. To be sure, there may be some increase in caseload as litigants test the new statutes. But the large numbers of class actions that we are seeing in state courts are due (at least in part) to counsel filing overlapping class actions—cases asserting the same claims on behalf of the same purported classes of people. As I noted above, federal courts (unlike state courts) are able to consolidate such matters before a single judge and thereby achieve great efficiencies. What would have been five distinct, burdensome class actions requiring the attention of five different state court judges can become a single proceeding before a single judge in the federal court system.

I want to offer one important caveat to my views regarding this legislation. I urge the Committee to reexamine the proposal for adding subsection (f) to 28 U.S.C. §1447. I am very concerned that as drafted, that provision will allow class counsel to take their proposals to state courts and to ask those courts to reconsider federal court denials of class certification. If a federal court has taken the time to consider the class issues in a case and has denied class certification, that should be the end of it. State courts should not be reconsidering or overruling that decision. It is therefore imperative that section 1447(f) be revised to make that point clear. One approach may be to alter the proposed section 1447(f) to provide that where class certification is denied in cases subject to these provisions, the cases should be remanded to state court for the sole purpose of allowing adjudication of the individual claims asserted in the complaint.

In H.R. 1875, the House has been offered a simple approach to addressing these problems that will make a difference—legislation that will have a positive impact on how class actions are litigated in this country. The bill will have that impact without having to make any changes in the substantive legal rights of any person.

Congress can do a great deal of good by enacting this relatively minor addition to our federal diversity-of-citizenship and removal statutes. I therefore urge the Committee to report favorably on this bill.

Thank you again for allowing me to offer my thoughts on this legislation.

Mr. PEASE. Thank you very much, Judge, and your complete written statement will be included as a part of the record, as will the statements of all the other panelists. Mr. Dellinger.

STATEMENT OF WALTER E. DELLINGER, III, FORMER SOLICITOR GENERAL

Professor DELLINGER. Thank you very much. I would like to echo much of what Judge Bell has said. My full statement will be in the record. Let me make some larger points about the structure of this debate.

H.R. 1875 is not only fully constitutional, it implements a key goal of article III of the Constitution, which was designed to ensure a neutral Federal forum for those multi-State cases that concern more States than one, and that have a significant potential impact on the national economic interest.

The coming together of the American Colonies into a single Nation was more difficult than we can easily now remember. They had fought the Revolutionary War as allies, with each State having its own uniform—they did not have even uniform uniforms—and, most particularly, for our purposes, they had been more trading rivals than partners. And in the aftermath of the Revolutionary War, General Washington said "We are fast verging to anarchy and chaos," in significant part because of the trading rivalries of the States precluding the development of anything approaching a national economy.

And as Judge Bell noted, it was the Annapolis Convention that was concerned about the inability of these fledgling rivalrous States, their inability to form a real economic union under the Articles of Confederation that led to the Framers gathering in Philadelphia in the Summer of 1787. And among the signal achievements of that gathering in Philadelphia was the creation of the greatest common market the world had ever known, on the continent of North America. And the creation of that single national economy, that last common market, from the Atlantic to the Pacific, from the Saint Croix to the Gulf of Mexico, is what led to Western prosperity as we know it today.

And critical to that was the decision in article III of the Constitution, to provide a system of neutral courts so that anyone venturing for trade or business into any of the States of the Union would be confident that there would always be a neutral forum under the courts of the Nation where any litigation could be brought or maintained. So the diversity jurisdiction at the heart of article III was very much a part of the overall vision of creating a single national economy and a single national common market.

There is simply no dispute that all of the matters that would be brought into Federal court under H.R. 1875 are fully within the constitutional scope of article III's definition of the judicial power of the United States. There is no dispute about that. And from the time of the 1st Congress, what the national legislature has done is to determine which aspects of the article III diversity jurisdiction should be conferred upon the Federal courts. And I think the bill before us today that this committee is considering is one which makes the most sensible use of the diversity jurisdiction—that is, it takes those cases that have a real economic impact that is national in scope, that affect the way business is done, that affect the rights of consumers throughout the Nation, and where it meets the diversity standards of article III of the Constitution, those important class actions are brought into Federal court.

As Judge Bell noted, the class action was not known when the 1st Congress passed the 1789 Judiciary Act. It is clear that if you were starting to create Federal jurisdiction, this would be the paradigm of the kind of cases that it would be most appropriate to have within the scope of the Federal courts.

The objections to the bill are, by and large, objections to diversity jurisdiction itself. And I think they attack diversity jurisdiction where it is most important rather than where it is least important.

In my view, it would simply be indefensible for Congress, which has this responsibility for defining the scope of Federal jurisdiction, to continue the process of having Federal courts adjudicate automobile accident cases between one citizen from Maryland and one from Virginia, while depriving of access to the neutral Federal forum cases of such enormous economic consequence to the Nation which have true multi-State elements.

I would be happy to answer questions on this if there is any serious constitutional objection. The Supreme Court has noted that there are residual issues of State sovereignty, but here there is a clear textual constitutional commitment of the diversity jurisdiction to Federal courts and exercising it by giving these cases that are at the heart of article III to the possibility of Federal court adjudication seems fully consistent with the constitutional scheme.

[The prepared statement of Professor Dellinger follows:]

PREPARED STATEMENT OF WALTER E. DELLINGER, III, FORMER SOLICITOR GENERAL

Thank you very much for allowing me the opportunity to express some thoughts regarding this important legislation, which would permit federal courts to entertain multi-state class actions that have a significant impact upon the national economy and that by all rights are appropriately adjudicated by our national courts. Mr. Chairman, I have attached a short bio to this testimony. I will only note here that for more than a decade, I have been concerned with the problems associated with mass tort adjudication, and with excessive or repetitive punitive damages awards in particular.

A. THE NEED FOR H.R. 1875.

Class actions are designed primarily to address situations in which large numbers of individuals have a common legal claim (typically against the same entity) but the amount of each individual's claim is not sufficient to make it economical to bring a separate lawsuit. The class action mechanism allows aggregating the claims, thereby giving the group of plaintiffs their day in court.[1]

This legislation would not prohibit any class actions from being filed, as it does not address *whether* class actions should be brought. Instead, it addresses *where* a particular type of class action should be adjudicated, namely, interstate class actions that involve plaintiffs and defendants from several states and that call for the interpretation and application of the laws of many different states. The issue, more specifically, is whether federal courts should generally be charged with responsibility for handling these large-scale, interstate class actions involving issues with significant national commercial implications; or should those cases instead be reserved exclusively to state courts? The answer, one might think, is self-evident. But the actual experience, in fact, is to the contrary.

Over the past ten years, class action filings in state courts have increased at a rate that significantly exceeds filings in federal court.[2] Interstate class actions remain in state court despite their apparent national character because of an anomaly in the federal jurisdictional laws. The Constitution provides for federal court jurisdiction over cases of a distinctly federal character—for instance cases raising issues

[1] *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 617 (1997).

[2] *Analysis: Class Action Litigation—A Federalist Society Survey*, Class Action Watch (Federalist Society Litigation and Practice Group, Class Action Subcommittee) at 5 (Vol. 1, No. 1); Deborah Hensler, et al., Preliminary Results of the RAND Study of Class Action Litigation 15 (May 1, 1997).

under the Constitution or federal statutes, or cases involving the federal government as a party—and generally leaves to state courts the adjudication of local questions arising under state law. But the Constitution specifically extends federal jurisdiction to encompass one category of cases involving issues of state law: "diversity" cases, or suits "between Citizens of different States." The First Congress established federal court jurisdiction over diversity cases in the Judiciary Act of 1789, and diversity cases have remained a part of federal court jurisdiction ever since. The Framers included diversity cases within the jurisdiction of federal courts out of a fear that prejudice (or at least a perception of prejudice) to defendants might result in circumstances in which a state court adjudicates a case brought by in-state plaintiffs against an out-of-state defendant.[3] The Framers were also concerned that state courts might unduly discriminate against interstate businesses and interstate commercial activity, and saw diversity jurisdiction as a means of generally ensuring the protection of interstate commerce.[4]

Although interstate class actions would seem to fall squarely within the core of diversity jurisdiction, they do not for two principal reasons, both of which are longstanding, technical limitations on diversity jurisdiction that predate the advent of the modern class action. First, and most significantly, the diversity statute has been interpreted to require "complete" diversity, so that diversity jurisdiction is lacking whenever any single plaintiff is a citizen of the same state as any single defendant.[5] In interstate class actions, which typically involve extremely large numbers of plaintiffs in the class, it is exceedingly unlikely that there will not be at least one plaintiff who shares a home state with one defendant. (In fact, interstate class actions often involve nationwide plaintiffs' classes with representatives from *every* state, in which case diversity jurisdiction is categorically foreclosed.) In any event, plaintiffs can easily evade federal jurisdiction by adding to the class of plaintiffs or to the list of defendants in order to ensure that at least one plaintiff and defendant share a common state citizenship.

Second, in order to ensure that diversity jurisdiction extends only to nontrivial state-law cases, the diversity statute has always required that there be a certain amount of recovery at stake in the case before conferring federal jurisdiction. That amount is currently $75,000.[6] In class actions, that requirement has been understood to require that *every* plaintiff in the class must assert a claim involving at least $75,000, even if the aggregate amount at stake in the case might exceed hundreds of millions of dollars.[7] Again, plaintiffs' attorneys can configure the claims in order to ensure that at least one class member does not satisfy the minimum amount, or can raise the dollar amount after the one-year period for removal has passed.

Thus, we are left with the strange, and in my view, indefensible situation in which federal courts have jurisdiction over a garden-variety state law claim arising out of an auto accident between a driver from one state and a driver from another state, or a run-of-the-mill trespass claim involving a trespasser from one state and a property owner from another. But at the same time, federal jurisdiction does *not* encompass large-scale, interstate class actions involving thousands of plaintiffs from multiple states, defendants from many states, the laws of several states, and hundreds of millions of dollars—cases that have obvious and significant implications for the national economy.

B. H.R. 1875 CURES THE JURISDICTIONAL ANOMALY.

H.R. 1875 would correct that anomaly by amending the diversity statute to provide for federal jurisdiction over interstate class actions. It should be noted that, no one disputes the fact that the category of cases encompassed by H.R. 1875 falls within the "judicial Power of the United States" set out in Article III of the Constitution. Congress has chosen to invest some but not all of the federal courts' diversity jurisdiction in the federal courts,[8] and the "complete" diversity requirement was adopted before the development of class action lawsuits. Consequently, H.R. 1875's extension of federal courts' diversity jurisdiction to cover interstate class actions is

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[3] *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 347 (1816); *Bank of the United States* v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809).

[4] John P. Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Probs. 3, 22–28 (1948); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1928)

[5] *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

[6] 28 U.S.C. § 1332(a).

[7] *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1974).

[8] *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 373 n.13 (1978); *State Farm Casualty Co.* v. *Tashire*, 386 U.S. 523, 530–531 (1967).

entirely in keeping with the scope of the federal judicial power in Article III, and also with the Framers' intent that Congress define the contours of federal jurisdiction (within Constitutional limitations) in accordance with the national interest.

H.R. 1875 specifically would allow federal courts to adjudicate class actions where any member of the class of plaintiffs is from a different State than any defendant. Significantly, however, the bill does not extend federal jurisdiction to encompass "*intra*state" class actions, where the claims are governed primarily by the laws of the state in which the case is filed and the majority of the plaintiffs and the primary defendants are citizens of that state. Moreover, federal jurisdiction would not lie over cases in which the aggregate claims do not exceed $1 million in value. The upshot of the legislation is therefore to allow federal courts to exercise jurisdiction over truly interstate class actions with significant nationwide commercial implications, while retaining exclusive state court jurisdiction over more local class actions that principally involve parties from that state and application of that state's own laws.

There are many reasons for favoring federal court resolution of interstate class actions. First, there is a clear federal interest in federal supervision and management of cases with significant implications for national and interstate commerce. The rationales behind diversity jurisdiction apply with special force to interstate class actions: They typically involve out-of-state defendants and at least some in-state plaintiffs, thereby raising at least some danger of prejudice against the out-of-state defendant. And they squarely implicate the Framers' concern with preserving national standards for regulating and protecting interstate commerce through the exercise of diversity jurisdiction. In fact, the substantial federal interest in protecting interstate commerce is an integral part of our constitutional history, as much of the impetus for calling the Constitution Convention stemmed from a general concern that the Articles of Confederation provided the federal government too little authority to regulate interstate commerce.[9] Accordingly, Chief Justice Marshall recognized early on that the Commerce Clause embodies the substantial federal interest in regulating "that commerce which concerns more States than one," as distinguished from "the exclusively internal commerce of a State," which is more properly the concern of the states alone.[10] The large-scale, interstate class actions addressed by H.R. 1875 will in every instance involve "that commerce which concerns more States than one."

In addition to the apparent federal interest, federal courts possess significant institutional advantages over state courts in adjudicating interstate class actions. For example, plaintiffs may file the same class action in several different state courts, attempting to convince each state court to certify the case for class action treatment until one ultimately agrees. That same strategy is unavailable in federal court, because federal law properly and efficiently authorizes consolidation in one court of cases involving overlapping claims.[11] The absence of such mechanisms in state court gives rise to obvious inefficiencies, including duplicative discovery proceedings. As a result, a host of state court class actions and one consolidated federal class action might simultaneously address the very same issues involving the very same parties, in contravention of the Chief Justice's recent admonition that "we can no longer afford the luxury of state and federal courts that work at cross-purposes or irrationally duplicate one another."[12] Federal courts also normally have larger staffs than state courts, and, unlike many state courts, can draw upon magistrate judges or special masters for assistance with various matters including discovery. Finally, federal courts, through the exercise of their diversity jurisdiction, generally have far more experience than the typical state court in interpreting and applying the laws of several different states and in resolving the complex and intricate choice-of-law issues that arise in large-scale, interstate class actions.

C. THE FALSE FEDERALISM OBJECTION.

The principal objection to H.R. 1875 purports to draw on federalism principles, contending that the proposed legislation would entail an unwarranted federal intrusion into the ability of states to experiment with class action lawsuits. That line of reasoning reflects a wholly misguided understanding of federalism, which I think may fairly be labeled "false federalism." To begin with, there can be no federalism-based objection to the general authority of federal courts to construe and apply state law: The very premise of diversity jurisdiction is that federal courts would apply

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[9] Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335–41 (1934).

[10] *Gibbons* v. *Ogden*, 9 Wheat. 1, 194 (1824).

[11] 28 U.S.C. §1407.

[12] *1993 Year-End Report on the Federal Judiciary*, 17 Am. J. Trial Advoc. 571, 572 (1994).

state law in a particular category of cases, and diversity cases have been an integral part of the federal courts' jurisdiction since the Framers specifically provided for them in the Constitution and the first Congress enacted the Judiciary Act of 1789. So the question is not *whether* federal courts should interpret state law, but instead in *which* cases federal courts should do so. And, as I have explained, of all situations in which a federal court might be assigned diversity jurisdiction, it seems most desirable for federal courts to possess authority to adjudicate interstate class actions, cases that have a decidedly national flavor.

In addition, H.R. 1875 does not contemplate any federal displacement of state policy choices manifested in *substantive* law. In fact, the proposed legislation does not touch on substantive law in any manner. Instead, the legislation would apply uniform, federal *procedural* requirements to a narrow, carefully defined group of lawsuits with national economic impact, thus allowing realization of enhanced efficiencies resulting from federal courts' authority to coordinate and consolidate overlapping pretrial proceedings and their relative familiarity with complex and intricate choice-of-law considerations.

Significantly, H.R. 1875's exclusion of federal jurisdiction over *"intra*state" cases would specifically respect and maintain a state's authority to apply its own laws in cases that primarily involve parties from its own state. The legislation extends federal jurisdiction over *inter*state class actions, in which state courts are often called upon to apply *other states'* laws. And a state of course does not have any cognizable, federalism-based interest in interpreting, applying, and thereby dictating the substantive law of *other* states. Many state courts faced with interstate class actions, however, have undertaken to dictate the substantive laws of other states by applying their own laws to all other states, which results essentially in a breach of federalism principles by fellow *states* (not by the federal government). And because the state court decision has binding effect everywhere by virtue of the Full Faith and Credit Clause, the other states will have no way of revisiting the interpretation of their own laws. H.R. 1875 would curb this disturbing trend.

A good example of this problem arises out of a case in Illinois which was discussed in detail in a recent *New York Times* article.[13] The title of the full-page article states that "Suit Against Auto Insurer Could Affect Nearly All Drivers." The article reports that individuals representing a host of constituencies—including Public Citizen, the Attorneys General of Massachusetts, New York, Pennsylvania, and Nevada, the National Association of State Insurance Commissioners—are "alarmed" by this lawsuit. The reason they are so alarmed is that a rural court in Illinois is on the verge of telling all other states what their auto insurance laws should be. The specific issue in the multi-billion dollar, nationwide class action is whether auto insurers' use of "aftermarket" auto parts in repairs (as distinguished from parts made by the original manufacturer) amounts to fraudulent behavior. The Illinois court is prepared to apply Illinois law to all fifty states even though state policy on the use of aftermarket parts varies widely: Some states in fact encourage or require insurers to use aftermarket parts in an effort to reduce insurance rates. According to the *Times* article, the Illinois court is therefore about to "overturn insurance regulations or state laws in New York, Massachusetts, and Hawaii, among other places," and is going "to make what amounts to a national rule on insurance."

In another example, a state court in Minnesota recently approved for class action treatment a case involving millions of plaintiffs from 44 states that will have the effect of dictating the commercial codes of all those states.[14] The specific issue in the case is whether individuals have a state law right to recover interest on refundable deposits paid to secure an automobile lease. In certifying the class of plaintiffs, the court adopted an understanding of Minnesota's version of the Uniform Commercial Code (UCC) that was contrary to the interpretation of every other state to have considered the issue under their own versions of the UCC. And by certifying the class, the court decided that its unprecedented interpretation of the UCC would bind the remaining 43 states that had yet to decide the question (even though, as Justice Ginsburg stated while a judge on the D.C. Circuit in addressing a similar issue, "the Uniform Commercial Code is not uniform,"[15] and is interpreted differently in different states). In essence, the action of the Minnesota court will establish the inter-

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[13] *Suit Against Auto Insurer Could Affect Nearly All Drivers*, N.Y. Times (Sept. 27, 1998), at 29. The profiled case is *Snider* v. *State Farm Mut. Auto. Ins. Co.*, No. 97–L–114 (Ill. Cir. Ct., Williamson County).

[14] *Rosen* v. *PRIMUS Aut. Financial Svcs., Inc.*, No. CT 98–2733 (Minn. D. Ct., 4th Jud. Dist., May 4, 1999).

[15] *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000, 1016–17 (D. C. Cir. 1986) (Ginsburg and Edwards, JJ.).

pretation of 43 *other* states' UCC provisions even though the other states might well have reached a different conclusion by applying their own states' laws.

Yet another example in this vein arises out of a recent California case addressing whether home loan borrowers had been overcharged for collateral homeowners' insurance by the defendant bank.[16] The California courts have decided to preside over a class action involving a nationwide class of plaintiffs encompassing 25,000 borrowers in all 50 states, despite the fact that states have widely varying rules regulating the provision of collateral homeowners' insurance by banks. The effect of the California courts' decision is to overlook those differences and to dictate that California's resolution of the issue will be binding on all other states. Tellingly, the California courts relied on a prior California case involving a nationwide class action which stated that, "California's more favorable laws may properly apply to benefit nonresident plaintiffs when their home states have no identifiable interest in denying such persons full recovery."[17] That sort of sentiment flies in the face of basic principles of federalism by embracing the view that other states should abide by California law whenever a California court determines that its own laws are preferable to other states' contrary policy choices.

Federal courts, on the other hand, have exhibited particular sensitivity for the variations in substantive law among the different states, in accordance with core principles of federalism.[18] Moreover, when federal courts apply state law pursuant to their diversity jurisdiction, there is no danger of a bias in favor of any particular state's laws (which is not the case when one state decides to apply its own laws to all other states). Indeed, that is the basic premise underlying diversity jurisdiction.

For these reasons, I think any federalism-based objection to H.R. 1875 is simply off-base. If anything, in fact, the proposed legislation would *protect* the ability of states to determine their own laws and policies by restricting the ability of state courts to dictate the laws of other states, an outcome that would promote basic principles of federalism.

D. CONCLUSION.

H.R. 1875 is a straightforward measure that would allow federal courts to preside over interstate class actions that have significant implications for interstate commerce, while preserving the authority of state courts to preside over class actions in which the parties and the applicable law are primarily from the forum state. The bill accomplishes that result without affecting the substantive law of any jurisdiction or the legal rights of any person. I respectfully urge the Committee to report favorably on this bill.

Mr. PEASE. Thank you very much, Mr. Dellinger. Mr. Wolfman.

STATEMENT OF BRIAN WOLFMAN, STAFF ATTORNEY, PUBLIC CITIZEN LITIGATION GROUP

Mr. WOLFMAN. Mr. Chairman and members of the committee, thank you for the opportunity to appear today in opposition to H.R. 1875. Although Public Citizen actively works to improve the class action process, this bill would do nothing to further that goal, but would impose a radical transformation of authority between the State and Federal judiciaries that is not justified by any alleged crisis in State court class action litigation.

Before turning to the particulars, I want to say that we are here neither on behalf of class action defendants nor the plaintiffs' bar. We have devoted significant resources to opposing dozens of inappropriate or collusive class action settlements and excessive plaintiffs' attorneys' fees, including the major settlements that have caught the public's attention and the attention of this committee. Those cases arise in State *and* Federal court.

The point of these introductory comments is that we take a back seat to no one in fighting these improper cases to assure that in-

[16] *Washington Mutual Bank* v. *Superior Ct.*, 70 Cal. App. 4th 299 (Cal. Ct. App. 1999).
[17] *Clothesrigger Inc.* v. *GTE Corp.*, 191 Cal. App. 3d 605, 616 (Cal. Ct. App. 1987).
[18] *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

jured consumers will be justly compensated, that attorneys' fees are reasonable, and the class action tool isn't weakened, but in our judgment this bill will not aid consumers or combat collusion.

Let me turn to the specifics briefly. Section 3 of the bill allows proposed class actions to be filed in Federal court, if any member of a proposed class is a citizen of a State different from any defendant. As a practical matter, section 3, when combined with the removal provision of section 4, would end most State court involvement in consumer class actions of any kind. Although the bill provides that the Federal court may not entertain class actions it denominates as "intrastate," this exception would rarely kick in since it applies only where a substantial majority of the proposed class and all of the primary defendants are citizens of a single State and the claims asserted will be governed primarily by the laws of that State.

Attached to my written testimony is a list of State court class actions involving essentially intrastate disputes that would be forced into Federal court by H.R. 1875. I do not want to go through them, but let me give you one example here.

In *Morgan* v. *Bell Atlantic*, the class is composed of West Virginians who paid for inside wire maintenance sold by Bell Atlantic West Virginia, a West Virginia corporation, and its parent, Bell Atlantic. The class alleges that the defendants illegally "bundled" inside wiring maintenance service with their regular service. Although the class members are all West Virginians and the defendants have established a presence in West Virginia, under this bill any defendant could remove the case to Federal court because Bell Atlantic, just one of the defendants, is headquartered and incorporated out of the State. There is no Federal interest in resolving such a dispute because it does not involve Federal law. More important, the West Virginia courts have a strong interest in resolving the case to assure that West Virginia law is properly enforced. That interest is usurped by the bill. Indeed, this example makes clear that the bill is little more than a corporate defendant choice of forum act since it allows the defendants, not the plaintiffs, to select the court system it prefers. It is a resounding vote of no-confidence in the State courts.

State court class actions continue to provide significant relief to consumers who would otherwise have gone without compensation. One example, which is also included in our attachment, is the *Coleman* v. *GAF* case from the Alabama State courts. A settlement was struck to provide thousands of injured plaintiffs with the replacement or repair of their defective roof shingles. As originally proposed, the settlement contained serious problems, including inadequate notice of the remedy. But the court—the Alabama State court—allowed objectors to intervene and, as a result, the settlement was modified to remedy the settlement's serious flaws. The case was based on State law, and there is nothing to suggest that a Federal rather than a State forum was essential in that case, and in the others that we comment on in our full testimony.

The rationale of diversity jurisdiction when it was first enacted at the end of the 18th century was to avoid prejudice against out-of-State defendants. To quote Chief Justice Rehnquist, "At that time, there was reason to fear that out-of-State litigants might suf-

fer prejudice at the hands of local State court judges and juries, and there was legitimate concern about the quality of State courts. Conditions have changed drastically in two centuries."

Under H.R. 1875, an in-State class of plaintiffs suing under their own State law can keep a State law class action in State court only if the primary defendants are all citizens of that State. That makes little sense in a society in which large corporations have a significant business presence in many States. Surely, Disney should be suable in State court in Florida as well as in California where it has its headquarters. Ford should be suable in Kentucky where it has a substantial manufacturing plant as well as in Michigan where it has its headquarters. At the very least, plaintiffs ought to be able to sue in a State court in a State where any primary defendant has a substantial business presence.

In closing, I want to reiterate our opposition to the bill. Since the founding of the Republic, generally speaking, litigation of State law questions were to be the province of State courts. When abuses occur in the State *or* the Federal system, the courts must be vigilant in stopping them and seeing that they don't reoccur, but under no circumstances should Congress adopt the overkill, heavy-handed approach of H.R. 1875. I would be happy to answer any questions, and thank you again for the opportunity to appear here today.

[The prepared statement of Mr. Wolfman follows:]

PREPARED STATEMENT OF BRIAN WOLFMAN, STAFF ATTORNEY, PUBLIC CITIZEN LITIGATION GROUP

Chairman Hyde and members of the Committee: Thank you for the opportunity to appear today in opposition to H.R. 1875, the Interstate Class Action Jurisdiction Act of 1999. Although Public Citizen supports the use of class actions and actively works to improve the class action process, this bill would do nothing to further that goal. To the contrary, H.R. 1875 is an unwise and ill-considered incursion by the federal government on the jurisdiction of the state courts. It works a radical transformation of judicial authority between the state and federal judiciaries that is not justified by any alleged "crisis" in state-court class action litigation.

Before explaining the basis for my conclusion that H.R. 1875 should not be enacted, I want to describe my experience in class action litigation. I am a staff attorney with Public Citizen Litigation Group, a non-profit, national public interest law firm founded in 1972, as the litigating arm of Public Citizen, a consumer advocacy organization with approximately 150,000 members. Like other lawyers who represent consumers, we use class actions in situations where litigation of individual claims would be economically impossible.

Because we value class actions as an important tool for justice, we have, for a number of years, combatted abuses in the class action system. We have increasingly devoted resources to opposing what we believe are inappropriate or collusive class action settlements, and have become the nationwide leader in fighting class action abuse. Among the more than 30 nationwide class actions settlements on which we have worked, we have served as lead or co-counsel for objectors in many of the most important cases, including *Bowling* v. *Pfizer* (Bjork-Shiley heart valve); *Amchem* v. *Windsor* (settlement of future asbestos personal-injury cases, also known as *Georgine*); *Wish* v. *Interneuron Pharmaceutical* (Redux diet drug); *Hanlon* v. *Chrysler Corp.* (Chrysler mini-vans); *In re Telectronics Pacing Systems, Inc.* (pacemaker leads); *Duhaime* v. *John Hancock Mut. Life Ins. Co.* (life insurance sales practices); *In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.* (GM C/K Pickup Trucks); and *In re Ford Motor Co. Bronco II Prod. Liab. Litig.* (Ford Broncos). In these cases, we have objected to settlements that we thought grossly undervalued the plaintiffs' claims and/or we have opposed what we believed were the inflated fees of the plaintiffs' attorneys.

In addition, we have written articles on the problems we have encountered in class action settlements for law reviews and the popular press. *See* Brian Wolfman & Alan Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439 (1996); Brian Wolfman, *Forward: The National Asso-*

ciation of Consumer Advocates' Standards and Guidelines for Litigating and Settling Class Actions, 176 F.R.D. 370 (1998); David C. Vladeck, *Trust the Judicial System to Do Its Job*, The Los Angeles Times, p. M5 (Apr. 30, 1995); Brian Wolfman, *Class actions for the injured classes*, The San Diego Union Leader, p. B–11 (Nov. 14, 1997).

The point of these introductory comments is that Public Citizen takes a back seat to no one in fighting improper class actions, to assure that injured consumers will be justly compensated, that class action attorneys' fees are sufficient (but not excessive), and the class action tool is not weakened. In our judgment, H.R. 1875 will not aid injured consumers or combat collusion, but it will work a massive shift of power and cases to our overburdened federal courts at the expense of the state courts, the traditional forum for hearing disputes involving state law.

I. THE ENORMOUS EXPANSION OF FEDERAL JURISDICTION.

Section 3 of H.R. 1875 allows proposed class actions to be filed in federal court if "any member of a proposed plaintiff class is a citizen of a State different from any defendant. . . ." Building on the language in section 3, section 4 of the bill permits removal from state court to federal court of any class action meeting these expanded criteria for filing class actions in federal court. Thus, as a practical matter, section 3, when combined with section 4's removal provision, would end most state-court involvement in consumer class actions. Although the bill provides that the federal court may not entertain class actions denominated as "intrastate," this exception applies only where a "substantial majority" of the proposed class *and* all of the primary defendants are citizens of a single state, *and* the claims asserted will be governed primarily by the laws of that state.[1]

As explained below, the bill would effectively eliminate state-court jurisdiction over class actions involving *only* in-state plaintiffs and *only* that state's law, simply because *any* primary defendant's principal place of business or state of incorporation is out of state, even where that defendant does substantial in-state business. As a result, the bill shifts an enormous amount of power from state to federal courts at a time when the federal courts are already overwhelmed.

Two hypothetical cases illustrate our point. Assume that over the past two years a regional life insurance company, with headquarters in Georgia and incorporated in Delaware, and with a sales force of agents employed by the company's Florida affiliate, fleeced 100,000 of its Florida customers, by charging premiums higher than those promised and not paying certain benefits. On average, each customer lost about $1,000. The company, the Florida affiliate, and the sales agents particularly targeted senior citizens. The customers file a class action against the company, the Florida affiliate, and the key agents who helped perpetrate the scheme in Florida state court alleging solely violations of Florida law. Under H.R. 1875, any of the defendants would have the option of removing this class action to federal court. There is no federal interest in resolving such a dispute because it does not involve federal law; more important, the Florida courts have a strong interest in resolving the case, to assure that Florida law is properly enforced. That interest is usurped by H.R. 1875. Indeed, this example makes clear that H.R. 1875 is little more than a "Corporate Defendant Choice of Forum Act," since it allows the corporate defendants—not the plaintiffs—to select the court system it prefers.[2]

Similarly, a class of Oklahoma landowners allege that they have been unlawfully deprived of oil and gas royalties by an Oklahoma-based utility company (through its Oklahoma-based sales force), and by the Oklahoma firm's parent company, a Texas-based energy conglomerate, incorporated in Delaware. The landowners file suit in state court under a Oklahoma consumer protection statute and Oklahoma common-law. There is no reason why a state court should not handle this class action. Surely, most Oklahoma trial courts, and the Oklahoma appellate courts on review, will be more familiar with the state-law issues than a federal court sitting in Kansas or the relevant federal appeals court headquartered in Denver. And yet H.R.

[1] The bill would also bar federal jurisdiction over so-called "limited scope" class actions, where the *aggregate* damages asserted by *all* class members do not exceed $1 million or in which there are less than 100 class members. This provision would have little or (more likely) no practical effect. We are not aware of any significant consumer class actions that are "limited scope" class actions.

[2] Under current law, this case would remain in state court because the plaintiffs and many of the defendants are citizens of Florida, and thus there is not the necessary diversity of citizenship to establish federal jurisdiction under 28 U.S.C. 1332. In addition, federal jurisdiction might also be lacking because each class member does not appear to have the requisite $75,000 in controversy. *See Zahn* v. *Int'l Paper Co.*, 414 U.S. 291 (1973).

1875 virtually assures that, regardless of the plaintiffs' wishes, this one-state controversy, involving only state law, will end up in federal court.

But the cases need not be hypothetical. In *Hidi* v. *State and County Mutual Fire Ins. Co.*, a class of insureds alleged that they were improperly charged a deductible. The class maintained that third parties—people who caused accidents involving their cars—were responsible for the deductibles and that Texas law required the insurance companies to sue those third parties to recover the class members' deductibles. Although most if not all of the class members are Texans, because two of the defendants are out-of-state corporations, under H.R. 1875, the defendants would have the right to force this intra-state controversy into federal court.

In *Morgan, Sword* v. *Bell Atlantic*, the class is composed of West Virginians who paid for inside wire maintenance sold by Bell Atlantic-West Virginia, Inc, a West Virginia corporation, and its parent, Bell Atlantic. The class alleges that the defendants illegally "bundled" inside wiring maintenance service with their regular phone service and charged their customers a monthly service charge. Although all (or virtually all) of the class members are West Virginians, and the defendants have an established presence in West Virginia, under H.R. 1875, any defendant could remove the case to federal court, because Bell Atlantic is headquartered and incorporated out of state. There is simply no reason why the state court should be divested of its traditional role of hearing this kind of purely intra-state dispute involving only state law.[3]

As these examples show, H.R. 1875 dishonors the proper spheres of the states and the federal government in our federal system. The bill is a resounding vote of "no confidence" in our state courts. It is premised on a deep—and misplaced—distrust in state courts' ability to uphold the law. Our Constitution properly assumes that the states are fully capable of interpreting their own laws and handing out justice impartially.

Although this radical revision of the allocation of authority between the state and federal courts is enough in itself to warrant the defeat of H.R. 1875, it is the inefficiencies created by the bill that will pose the largest roadblock to justice for ordinary citizens. By channeling most state-law based class actions to the federal courts, H.R. 1875 will further weaken the ability of litigants to obtain justice in our federal courts. As Chief Justice William H. Rehnquist has repeatedly explained in his annual report on the judiciary, the federal courts are already overburdened with cases that traditionally are dealt with in state courts, and the federal courts cannot bear any additional burden. *See, e.g.*, William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary* 5–7 (Jan. 1, 1999). And the Chief Justice has particularly asked Congress to consider reducing, not expanding, federal diversity jurisdiction. *Id.* at 7.

Moreover, not only would H.R. 1875 increase the caseload of the federal courts, but it would do so with cases that are extremely complex and time consuming. Making matters even worse, these new federal cases involve solely issues of state law, with which state-court judges are intimately familiar, but federal judges generally are not.

The caseload burden imposed by H.R. 1875 would be reason enough to reject this legislation at any time, but the problem is particularly acute now, because there are a large number of federal judicial vacancies and the civil docket in some districts is severely backlogged. In short, H.R. 1875 promises that injured consumers will be put on "hold" in the overburdened federal courts, without any opportunity to litigate their cases in state courts where they properly belong.

The proponents of H.R. 1875 try to justify the bill on the ground that there is a class action "crisis" peculiar to the state courts. In general, the class action tool is a tremendous benefit to Americans. It is an important and powerful component of our civil justice system that can compensate ordinary citizens who, acting individually, would not have the means to challenge corporate and governmental wrongdoers. As noted at the outset of this testimony, Public Citizen recognizes that class action abuse threatens to sour the public and harm the very people that the class action tool is supposed to help. But it is wrong to think that abuse is limited to state courts. Last year, a federal appeals court approved the Chrysler minivan settlement—where the settlement provided little more than Chrysler's prior promise to a federal regulator to fix the class members' defective door latches, with Chrysler agreeing to pay the lawyers five million dollars in fees! Both the federal *and* state courts must be vigilant and prevent such abuses and progress is being made in that regard.

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[3] Attached to this testimony as Exhibit 1 is a list of similar intra-state class actions in which plaintiffs would be deprived of their choice of forum under H.R. 1875.

The state courts can play a role in preventing abuse. For example, many of the anecdotes used by the proponents of H.R. 1875 are based on class actions in Alabama where, the argument goes, the state courts there have been certifying cases without following the proper procedures. Responding to due process and forum-shopping concerns from corporate defendants, however, the Alabama Supreme Court has abolished the practice of certifying class actions before the defendant has an opportunity to answer the suit. *See, e.g., Ex Parte State Mutual Ins. Co.*, 715 So.2d 207 (Ala. 1997); *Ex Parte American Bankers Life Assur. Co. of Fla.*, 715 So.2d 186 (Ala. 1997). The Alabama court made clear that classes may not be certified without notice and a full opportunity for defendants to respond and that the class certification criteria must be rigorously applied.

Meanwhile, state-court class actions continue to provide significant relief to consumers who would otherwise have gone without compensation. For instance, state-court class actions involving polybutylene pipe illustrate the importance of consumers banding together to fight corporate irresponsibility. Shell, Dupont, and other corporate giants sold leaky plastic pipes, which caused severe damage to the homes of tens of thousands of unsuspecting consumers. This state-court litigation resulted in hundreds of millions of dollars in recoveries and replacement of the faulty piping, which would never have occurred if the homeowners were required to face off against the companies on their own.

Another example is *Naef* v. *Masonite*—concerning claims of defects in hardwood siding on homes and commercial property—commenced in 1994 in Mobile County, Alabama. The defendant removed the case to federal court, but the case was later remanded because of a lack of federal jurisdiction. A state-court jury found for the plaintiffs on the question of whether the product was defective, and the matter then settled for hundreds of millions of dollars shortly before trial on liability and damages. Under H.R. 1875, this case could have been removed to federal court, although it appears that the matter was pursued vigorously in the state court and brought very considerable benefit to injured class members.

In another Alabama case—*Coleman* v. *GAF Building Materials Corporation*—a settlement was stuck that would provide thousands of injured plaintiffs with a replacement or repair of their allegedly defective roof shingles. As originally proposed, the settlement contained serious problems, including inadequate notice of the remedy. But objectors appeared, and the court allowed them to intervene to present their objections. The settlement was modified to remedy the settlement's serious flaws. The case was based on state law, and there is nothing to suggest that a federal, rather than state, forum was essential.[4]

As evidence of the state-court class action "crisis," the supporters of H.R. 1875 rely on a few anecdotes of settlements in which the class members were cheated at the expense of their lawyers. As noted, abuses do occur in state *and* federal court, and that abuse must be fought in the courts. But the anecdotes are just that—anecdotes—and much more evidence showing a systematic pattern of abuse in the state (as opposed to federal) courts must be required before Congress should consider enacting anything approaching the radical transformation in our state-federal balance contemplated by H.R. 1875.

In sum, H.R. 1875 should be rejected as unwise and unnecessary. It is an unwarranted attack on the integrity of the state courts and their ability to provide justice to its citizens, and it comes at a time when the federal courts are unable to handle the enormous increase in caseload that H.R. 1875 would entail.

II. CONSTITUTIONAL CONCERNS.

H.R. 1875 should not be enacted for the policy considerations given above. The Committee should be aware, as well, that H.R. 1875 may also be constitutionally flawed. As this Committee is aware, our federal courts are courts of limited jurisdiction. Section 3 of the bill would stretch the limits, perhaps beyond the breaking point. The bill would overrule *Strawbridge* v. *Curtiss*, 3 Cranch 267 (1806), where the Supreme Court interpreted the diversity statute to require "complete diversity" between all named plaintiffs and defendants. *Strawbridge* is not a constitutional case and the Supreme Court has held that only "minimal" diversity (*i.e.*, diversity between one plaintiff and one defendant) is required by the constitution. *See State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967). However, in our judgment, the Supreme Court's endorsement of minimal diversity does not ensure the constitutionality of sections 3 and 4 of H.R. 1875, at least not in all of their applications.

[4] Further examples of successful state-court class actions are contained in Exhibit 1 to this testimony.

The relevant constitutional provision, Article III, section 2, provides that "[t]he judicial Power shall extend to . . . Controversies . . . between citizens of different States[.]" Assume a situation in which the named plaintiff and all the named defendants are citizens of state "X." 50% of the proposed class members are also citizens of state "X," but 50% of the proposed class members are citizens of states "Y" or "Z." When a proposed class action is filed, the class does not yet exist and a constitutional "controversy" exists only between the named plaintiffs and the defendant. Thus, in the hypothetical, prior to class certification, all of the parties are from the same state—X. Put another way, there is no controversy between the absent class members—on whom jurisdiction under H.R. 1875 hinges—and the defendant, and thus it is difficult to imagine how diversity jurisdiction can be constitutionally maintained in this circumstance prior to certification of the class and some reasonable assurance that there is, in fact, diversity. *See Sosna* v. *Iowa*, 419 U.S. 393, 399 (1975).

III. OTHER PROBLEMS WITH SECTIONS 3 AND 4 OF H.R. 1875.

Although we believe that H.R. 1875 should be defeated, it should surely not be enacted in its current form. The following amendments would improve the bill.

• The rationale of diversity jurisdiction when it was first enacted at the end of the 18th century was to avoid prejudice against out-of-state defendants. As the Chief Justice pointed out in his 1998 annual report, that rationale is not nearly so powerful in today's society. *See, e.g.*, William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary* 7 (Jan. 1, 1999) (noting that in 1789, when the Judiciary Act was enacted, "there was reason to fear that out-of-state litigants might suffer prejudice at the hands of local state-court judges and juries, and there was legitimate concern about the quality of state courts. Conditions have changed drastically in two centuries.").

Under H.R. 1875, an in-state class of plaintiffs suing under their own state law can keep a state-law class action in state court *only* if the primary defendants are citizens of that state. (A corporation's citizenship is generally defined to include both the state in which it has its principal place of business and its state of incorporation). To be blunt, that makes little sense in a society in which large corporations have a significant business presence in many states. Surely, Disney should be suable in state court in Florida, as well as in California, where it has its headquarters. Ford Motor Company should be suable in state court in Kentucky, where it has a substantial manufacturing plant, as well as in Michigan (where it has its headquarters). Proctor & Gamble should be suable in state court in Georgia and Missouri, where it has substantial business operations, not just in Ohio (where it has its headquarters and is incorporated). Thus, at the very least, the portion of proposed 28 U.S.C. 1332(b)(2)(A)—defining the kinds of "intrastate" class actions over which a federal court may not exercise jurisdiction—should be amended. Under the amendment, the federal court would not have jurisdiction in class actions in which a substantial majority of the class members are citizens of a single state of which the primary defendants are also citizens "or in which the primary defendants have a substantial business presence," and the claims asserted will be governed primarily by the laws of that state.

• Section 4(e) of H.R. 1875 (proposed 28 U.S.C. 1447(f)) provides that the statute of limitations for any claim that was asserted on behalf of a class member in an action dismissed or remanded to state court for failure to meet Rule 23's class certification criteria "shall be deemed tolled to the full extent provided under Federal law." This provision is unfair for two reasons.

First, under *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538 (1974), tolling would apply in any future individual action in federal court. As a practical matter, this means that the statute of limitations for the claims of individual class members is tolled between the filing of the federal class action and the denial of class certification. However, it is not certain that all the state courts—where many subsequent individual actions would have to be filed—will adopt the *American Pipe* rule. Second, *American Pipe* arguably does not apply to the issue of whether the limitations period for a subsequent *class* action (as opposed to an individual action) would be tolled during the pendency of the original federal class action. Some federal circuit courts have held that American Pipe does not apply in that circumstance. *See, e.g., Korwek* v. *Hunt*, 827 F.2d 874, 879 (2d Cir. 1987).

The solution to both problems is the same. Rather than referring to "Federal law," the bill should simply provide that the claims of the class members are tolled during the pendency of any action in which jurisdiction is based on proposed section 1332(b).

In closing, I want to reiterate our opposition to this legislation. Since the founding of the Republic and the first Judiciary Act, it has been our shared national understanding that, generally speaking, litigation of state law questions would be the province of state courts. The enormous aggregation of power in federal court proposed by this legislation is unwise because it tears a large hole in the fabric of federal-state relations and because it adds a considerable burden on our already overworked federal court system. If there are genuine problems with state-court class actions, Congress should work hand-in-hand with state courts and legislatures to resolve them, mindful of the vital state interests that are implicated when Congress proposes curtailing state-court jurisdiction. But under no circumstances should Congress adopt the heavy-handed approach embodied in H.R. 1875.

EXHIBIT 1: STATE CLASS ACTION CASES THAT COULD BE ADVERSELY AFFECTED BY S. 353/ H.R. 1875

In the following sampling of typical class action cases a substantial majority, if not all, of the plaintiffs are in-state residents but one or more of the primary defendants are out-of-state defendants. Under the diversity rules proposed in S. 353 and H.R. 1875, the defendant(s) would be permitted to remove these cases to federal court even though the plaintiffs are all, or nearly all from one state, the cases are tried in a single state and they are based on that state's unique law. Fundamentally, there is no federal interest in these class action cases.

Removals to federal court are detrimental to consumers because:

- Defendants such as tobacco companies, HMOs, and drug companies that injure the public should not have the power to choose the legal forum they believe will benefit them most.
- Justice will be considerably delayed for injured consumers. The current high vacancy rate in the federal judiciary has already created a backlog of civil cases. Adding complex and resource-intensive class action cases that traditionally have been handled by the states will create further delays.
- State judges are more familiar with interpreting the intricate interrelationships of state tort and consumer protection laws. Losing their experience by moving complex class action cases to federal courts is inherently inefficient.
- State judges commonly are called upon to apply state law to new factual situations. Federal judges will be more reluctant to judicially extend state law; their reticence would have a negative impact on evolving areas of law such as tobacco and HMO litigation.

If H.R. 1875 or S. 353 had been enacted, the following claims based on state law could have been removed to federal court if the defendant determined that removal would be advantageous:

- *Aaron v. Abex Corp.*
  Class is current and former employees of Abex Corp. who claimed they had been exposed to asbestos while using a grinding wheel made by The Carborundum Co. to cut steel and sharpen hard-steel tools. A Texas jury found for the plaintiffs in the amount of $15.6 million in compensatory damages and $100 million in punitive damages. The case later settled for an undisclosed amount. The majority of plaintiffs were Texas residents, but the defendant is an out-of-state corporation.
- *Coastal Corp. v. Garza*
  Class is the owners of approximately 2,500 parcels located along a 15-mile industrial strip in Texas. The class alleged that years of discharge from a number of corporations located in this area, including Amerdad Hess Corp., Citgo Petroleum Corp., and Mobil Corp., contaminated the air, damaging some properties directly and decreasing the value of others. Most of the class are Texas residents, but the defendants are incorporated in a variety of states.
- *Crawley v. DaimlerChrysler Corp.*
  Class is approximately 75,000 owners of affected Chrysler cars (late 1988, 1989, and 1990 models) registered or purchased in Pennsylvania with driver's-side air bags with vents. The class alleged that the air bags had vent holes that released hot gases toward the three and nine o'clock positions on the steering wheel during deployment and caused burns. A jury found that the air bags were defectively designed, that Chrysler breached the implied warranty of merchantability for both the air bags and the cars, and that the breach was a substantial factor in causing harm to the plaintiffs. The jury

awarded each plaintiff $730 (total $58.5 million), the cost of buying a safer air bag. Most of the plaintiffs are Pennsylvania residents, but DaimlerChrysler is an out-of-state corporation.

- *Engle v. R.J. Reynolds Tobacco, et. al.*
  Class is all Florida citizens and residents, and their survivors, who have suffered smoking-related illnesses. The class alleged that their addiction to cigarettes was caused by the tobacco industry which "has distorted the clear medical and scientific data for their own selfish pecuniary gain and for decades has played statistical and semantic shell games with the lives and health of the American public." In the first part of the trial, the jury found that the cigarette makers "engaged in extreme and outrageous conduct." All of the plaintiffs are residents of Florida, but the defendant tobacco manufacturers are all out-of-state corporations.
- *Darla S. Guard et. al. v. A.H. Robins Company Inc., et. al.*
  Class is comprised of all people in Kentucky who, from the time of introduction to the date of recall, received fenfluramine and dexfenfluramine from Bariatrics Inc. of Kentucky and/or clinics operated by Dr. Duff. The class alleged that the defendants were deceptive in manufacturing, marketing, and selling drugs they knew to have adverse health consequences and seek medical treatment and monitoring. Most, if not all, of the plaintiffs are Kentucky residents, but the defendants are out-of-state corporations.
- *Hatcher v. First Tenn. Bank Nat'l Assoc. and Progressive Casualty Insur. Co.*
  Class is all borrowers of the bank who were forced to take insurance from Progressive as part of their property loans. The class alleged that the bank unfairly signed them up for superfluous insurance which included additional non-property coverage and was more expensive than basic coverage that could have been bought on the open market. Most, if not all, of the plaintiffs are residents of Tennessee, but Progressive Casualty is an Ohio corporation.
- *Hidi, et. al. v. State and County Mutual Fire Insurance Company, et. al.*
  Class is all persons who made successful car insurance claims to the defendant insurance companies but were improperly charged a deductible. The class alleged that a third party (i.e., people who stole their cars or caused accidents involving their cars) was responsible for paying the deductible due on their claims and that state law required the insurance companies to file suit against those third parties to recover their deductibles. Most, if not all, of the plaintiffs are residents of Texas, but two of the defendants are out-of-state corporations.
- *Jeanne C. Lemelledo v. Beneficial Management Corp. of America; Karen A. and Barry F. Gartland v. Beneficial Management Corp. of America and Beneficial Consumer Discount Company*
  These are two similar class actions. The classes are comprised of New Jersey (Lemelledo) and Pennsylvania (Gartland) Beneficial customers who had been tricked into paying for credit insurance included with their loans from Beneficial. The classes alleged that Beneficial's practice of pre-completing the loan forms so as to include the unwanted and unrequested insurance created the impression that such insurance was required in order for the consumer to obtain the loan. The class also alleged that Beneficial received undisclosed commissions from selling the insurance, but charged consumers amounts that did not reflect the actual amounts paid for the insurance. Most of the plaintiffs are in-state (New Jersey and Pennsylvania) residents, but under these bills the defendants could have removed these cases to federal court since Beneficial is a Delaware corporation.
- *Delilah Miller, et. al. v. Colortyme, Inc., et. al.*
  Class is comprised of individuals who entered rent-to-own contracts after April 7, 1986, that provide for ownership at the end of a predesignated term. The class alleges that DEF, Colortyme's parent corporation, violated various Minnesota consumer protection statutes by charging an excessive amount of interest on rent-to-own purchases in their stores. Most, if not all, of the plaintiffs are Minnesota residents, but under these bills the defendants could have removed this case to federal court since Colortyme is a Texas corporation.
- *Morgan, Sword, et al. v. Bell Atlantic*
  Class is customers of Bell Atlantic-West Virginia, Inc. who paid for inside wire maintenance service. The class alleged that Bell Atlantic illegally "bundled" inside wire maintenance service with their regular phone service and charged their customers a monthly service charge. Most, if not all, of the

plaintiffs are residents of West Virginia but Bell Atlantic is an out-of-state corporation.

- *Robert S. Napoletano et. al. v. CIGNA Healthcare of Connecticut, Inc.; F. Barrett Hollis et. al. v. CIGNA Healthcare of Connecticut, Inc.*
  These are two related class actions. *Hollis* class is comprised of CIGNA patients who reside in Connecticut and had begun treatment with the physicians who brought an action against CIGNA in *Napoletano*. *Napoletano* class is comprised of nine Connecticut physicians who had treated the plaintiffs in *Hollis* and were terminated from their contract for allegedly not following review procedures. The plaintiffs assert that the doctors were unjustifiedly removed from the CIGNA list of participating doctors and brought claims alleging unfair and deceptive acts of misrepresentation, false advertising, and breach of contract. Most of the plaintiffs are Connecticut residents, but under these bills the defendant could have removed these cases to federal court since CIGNA is an out-of-state corporation.
- *In re: Pennsylvania Diet Drugs Litigation; Earthman v. American Home Products, Inc.; Fred St. John v. American Home Products; Karen Rhyne, et. al. v. American Home Products Corp, et. al.; Birch v. American Home Prods. Corp.*
  Five individual statewide medical monitoring class actions where the classes are comprised of all people in Pennsylvania, Texas, Washington, Illinois, and West Virginia who have used fenfluramine (Pondimin) and/or dexfenfluramine (Redux) and have not been diagnosed with any injury. The classes allege that the defendants, American Home Products Corporation (comprised of Wyeth Laboratories, Wyeth Ayerst Laboratories Division, and A.H. Robins Company) and Interneuron Pharmaceuticals, failed to exercise reasonable care in designing, manufacturing, selling, testing, promoting, and distributing the drugs. The classes seek funds to continue medical monitoring for the plaintiffs. Each class is made up of in-state residents, but at least one "primary" defendant is an out-of-state corporation in each case. Consequently, under these bills defendants would be able to remove these cases to federal court.
- *Russell, et. al. v. Behr Process Corp.*
  Class is all residents of Western Washington State who own log homes, wood siding, or fencing treated with the defendant's sealers. The class alleged that they purchased and used the defendant's wood sealer products but that the products caused significant damage to their homes. All of the plaintiffs are residents of Washington State, but Behr Process is a California corporation.
- *Phyllis Small and Denise Fubini, individually, and on behalf of others similarly situated v. Lorillard Tobacco Company, Inc., R. J. Reynolds, Brown & Williamson Tobacco Corporation, Philip Morris, Inc., and The American Tobacco Company, Inc.*
  This is a group of five class actions brought by residents of New York who purchased cigarettes manufactured, promoted, and sold by the defendants. The class alleged that defendants intentionally misrepresented, concealed, and acted deceptively based on the knowledge that nicotine is addictive. Most, if not all, of the plaintiffs are New York residents, but the defendants are incorporated in a variety of different states.
- *Ada Solorzano et. al. v. Family Health Plan, Inc.*
  Class is subscribers of Family Health Plan's "Senior Plan," a coordinated care plan designed for Medicare beneficiaries. The class alleged that Family Health Plan violated California law by engaging in unfair and misleading advertising practices in soliciting subscribers. The majority of class members are California residents, but Family Health Plan is an out-of-state corporation.
- *Marcia Spielholz et. al. v. Los Angeles Cellular Telephone Company, Bellsouth Cellular Corporation, AT&T Wireless Services, Inc.*
  Class is comprised of all people who subscribed to cellular telephone services from LA Cellular between June 25, 1990 and the present. The class alleges that LA Cellular's representations about its calling area are inaccurate, misleading, and intentionally deceptive due to known gaps in the advertised coverage area. Most, if not all, of the plaintiffs are California residents, but many of the defendants are out-of-state corporations.
- *Williams et. al. v. Weyerhaeuser Company*
  Class is comprised of individuals and entities who own homes or other structures in California on which Weyerhaeuser hardboard siding has been installed from January 1981 to the present. The class alleges that the hardboard siding is inherently defective and prematurely fails when exposed to

normal weather conditions. Most of the plaintiffs are California residents, but Weyerhaeuser is a Washington corporation.

- *Robert Yoxtheimer, et al. v. Dairyland Insurance Co. and Sentry Insurance Co.* Class members are those who brought third-party claims against the motorist who caused the accident but were denied the claim due to the cancellation of the at-fault driver's Dairyland policy (or they did not bring a claim after being told there was no insurance coverage on the driver at fault). The class alleged that the insurance companies issued insurance and then improperly failed to pay claims. Most, if not all, of the plaintiffs are residents of West Virginia but the defendants are Wisconsin corporations.

For more information, contact Deborah Fleischaker, Legislative Counsel, at (202) 546-4996/ dfleisch@citizen.org, or visit our website at: http://www.citizen.org/congress/civjus/classaction/classhome.htm

Mr. PEASE. Thank you very much, Mr. Wolfman.
Professor Elliott.

STATEMENT OF E. DONALD ELLIOTT, PAUL, HASTINGS, JANOFSKY & WALKER, L.L.P.

Mr. ELLIOTT. Thank you very much, Mr. Chairman.

As a long-time teacher of complex litigation, I want to emphasize a couple of points about this legislation which I support. I think it is very modest and moderate legislation. It does not mess with or replace or override State policies, as some have charged. It does not raise any serious constitutional questions. I have cited in my prepared statement the Supreme Court cases that make it clear that Congress can have minimal diversity rather than require complete diversity. Rather than overriding State court choices about what type of class action rules to set, this legislation relies on the traditional remedy of removal into the Federal courts, and I see removal as a crucial safety valve in our Federal jurisprudence. Not only does it guarantee the reality and appearance of an independent forum, but it is the case that removal gently discourages abuses by State courts, not by overriding them—a State can still have whatever class action rule it wants—but by providing potential competition. So, it is like the provisions that we have in lots of other areas where we provide a gentle discipline to States by providing a Federal alternative.

My second point is that I think this legislation would not, in fact, as some have charged, federalize or force into the Federal courts all class actions. First of all, a very large number of States have rules that are essentially identical to rule 23 of the Federal Rules of Civil Procedure, and a number of States have requirements for class actions that are more demanding than the Federal rules.

The real explosion of class action litigation is in relatively few States, perhaps five or ten, which have very, very open-ended treatment of class action cases. And I think it is a very normal procedure in our system to set Federal minimum standards in that kind of situation. I think in my field of environmental law, we have "pollution havens." Well, what we are really dealing with here is we have created a few "class action havens." We have created a few States which have eliminated some of the minimum Federal standards and permit extraterritorial effect to their judgments, have very minimal notice requirements, and sometimes certify cases without any hearing at all.

I think a removal option is a very good way to deal with that situation because if a State's rules are being perceived as fair, defend-

ants are not going to avail themselves of the removal option to get to Federal court. I have been involved in numerous class action cases where the defendants didn't care whether they were in State or Federal court. You make an overall aggregate judgment, and if States go too far in developing rules that are not perceived as fair, I think we have a traditional way to deal with that.

I want to echo my colleague, Professor Dellinger's, comments about these kinds of cases really exemplifying the core purposes for which the Framers included diversity jurisdiction in the Constitution.

I am no great fan of diversity jurisdiction. I was part of the Federal Court Study Committee that recommended cutting back on diversity jurisdiction. But I think that it would, as Professor Dellinger said, be very, very anomalous to continue to allow individual slip-and-fall cases or automobile accidents between citizens of two States to be in Federal court under diversity jurisdiction and not deal with these cases which really go to the core purposes for which the Framers included diversity in the Constitution.

Now, you may wonder, unlike some of my academic colleagues who testified here a few months ago, I don't think I can read the minds of the Framers, and we don't have anything about the purposes of diversity jurisdiction in the Constitutional Convention itself, but I did find a very illuminating statement by James Wilson, one of the Framers in the Pennsylvania Ratifying Convention, and he explained why diversity was included in the Constitution. He said, "Impartiality is the leading feature in this Constitution, it pervades the whole," and he goes on to emphasize just the points that Professor Dellinger made. He says, "Is it not necessary, if we mean to restore either public or private credit, that foreigners as well as ourselves have a just and impartial tribunal to which they resort. I would ask how a merchant must feel to have his property lie at the mercy of the laws of Rhode Island. I ask how a creditor would feel who has his debts at the mercy of tender laws in other States." And then he goes on to say, "If we want to restore confidence in manufacturing and in commerce, this security for contracts can be obtained only if we give the power of deciding to the general government."

So, I think it is very clear that what Professor Dellinger and Judge Bell have said about the Framers' intentions really being fulfilled by this type of legislation, this legislation assures out-of-State manufacturers the possibility of an impartial forum either in the State court, or if the State court is perceived as not fair, an opportunity to remove to the Federal court. Thank you.

[The prepared statement of Professor Elliott follows:]

PREPARED STATEMENT OF E. DONALD ELLIOTT, PAUL, HASTINGS, JANOFSKY & WALKER, L.L.P.

SUMMARY

As a long-time teacher of complex civil litigation and class actions at Yale Law School, as well as a practicing attorney concentrating on complex environmental litigation, I am greatly concerned that recent developments have restricted the rights of litigants in large, multi-party class actions to remove these cases to a neutral federal forum on grounds of diversity of citizenship. The core purposes for which diversity jurisdiction was created—preserving the appearance as well as the reality of no bias in favor of local litigants—are particularly relevant in large class-action litiga-

tion against out-of-state corporations. However, overly rigid interpretations of the judge-made requirement for "complete diversity" of citizenship among all parties in class actions have made it virtually impossible to remove class actions to federal court.

I am a strong supporter of the concept of removal. I see removal as a crucial "safety valve" in our federal jurisprudence, and I strongly support the provisions of H.R. 1875 that would make removal to federal court in class actions cases a reality again by revising the complete diversity requirement. The removal option not only guarantees the reality and the appearance of fairness to the litigants directly involved, but—even more importantly—the removal option gently discourages abuses in the state courts by offering litigants a competitive choice to take their business elsewhere. Like other governmental programs that improve systems by giving users the option to go elsewhere if they are dissatisfied, removal does not override state court autonomy to choose whatever law or class action rule the state may like; keeping a removal option alive merely provides potential competition from an alternative forum. Finally, I believe that removal of class actions to federal court may be important for an additional reason: in many instances overall efficiency in terms of speed and reduced transaction costs can be enhanced by concentrating complex cases in a single federal forum for resolution.

To those who would complain that this legislation would bring more cases into the federal courts, my simple answer is that interstate class actions exemplify the core purposes for which the Framers included diversity jurisdiction in the Constitution. There are plenty of other cases involving diversity jurisdiction where we could pare back if necessary to make room for these cases.

STATEMENT

Thank you very much for the opportunity to discuss the important issues presented by the proposed legislation being considered by this Committee today—H.R. 1875, the Interstate Class Jurisdiction Act of 1999. I am particularly interested in the provisions of the bill amending the diversity jurisdiction statute to allow removal so that more interstate class actions to be heard by our federal courts.

I approach this subject from two different but related perspectives. First, I have taught complex civil litigation and class actions at Yale Law School since 1981—first, as a tenured professor ultimately holding the Julien and Virginia Cornell Chair in Environmental Law and Litigation, and since 1994, part-time as an adjunct professor at Yale while also practicing. I have spent a fair portion of my academic energy thinking and writing about how particular jurisdictional and procedural rules affect the resolution of complex disputes (particularly in environmental, toxic tort and consumer product injury cases). I also served as an adviser to the Federal Courts Study Committee. Second, as a practicing lawyer focusing on complex environmental litigation, I have had some experience with the practical effects of our current jurisdictional regime affecting class actions. (As requested by the Committee, a copy of my curriculum vitae is attached).

I. The Rising Tide of State Class Actions Is A Product Of The Federal Courts' Reluctance To Take Jurisdiction Over Interstate Class Actions.

A. There Is A Class Action Explosion In Some State Courts.

The flood of class-action litigation in our state courts across the United States is too well documented to warrant significant discussion, much less debate.[1] Why should we consider the state-court class-action explosion a crisis? For one simple reason: because the class action device has the (often realized) potential to put its heavy thumb on the scales of justice, affecting not only procedure but also in many instances the outcome of lawsuits. As I once observed in an article in the *University of Chicago Law Review*, judges often are inclined to certify cases for class-action treatment not because they believe a class trial to be more efficient than an individual trial, but because they believe class certification will simply induce the defendant to settle the case without trial.[2] Chief Judge Richard Posner of the U.S. Court

[1] Among other places, the ever-increasing rate at which state-court class actions are being filed against out-of-state corporate defendants has been documented in Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, Vol. 1, at ix-x (May 1, 1997) ("Advisory Committee Working Papers") (memorandum of Judge Paul V. Niemeyer to members of the Advisory Committee on Civil Rules); and Deborah Hensler, *et al.* (Institute for Civil Justice), Preliminary Reports of the RAND Study of Class Action Litigation, at 15 (May 1, 1997) ("ICJ Report") (stating that the "doubling or tripling of the number of putative class actions" has been heavily "concentrated in the state courts").

[2] See E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. Chi. L. Rev. 306, 323–24 (1986).

of Appeals for the Seventh Circuit has made the same point more recently and more bluntly: in his words, the mere act of certifying a class "often, perhaps typically, inflict[s] irreparable injury on the defendants."[3] When a class is certified in state court, where an out-of-state defendant has little confidence in the prospect of a fair and impartial trial on the merits, the coercive power of class certification is all the greater. Plainly, the judicial system is supposed to provide *procedures* and a *forum* for dispute resolution; it is not supposed to coerce particular outcomes.

B. The Federal Courts Have Played A Significant Role In Precipitating The Class Action Crisis In The State Courts.

Notwithstanding Chief Justice Marshall's admonition that the federal courts must assume jurisdiction over cases that come within the federal jurisdictional confines of the Constitution and applicable statutes,[4] the clear trend in the federal courts over the past several years has been to decline jurisdiction over interstate class actions in any and every way possible. For example, federal courts have given a very strong reading to the judge-made rule requiring "complete diversity"—the principle of federal diversity jurisdiction stating that no plaintiff in a lawsuit can be a citizen of the same state as any defendant. This rule may be quite sensible in other contexts, but in class actions, it virtually assures that large class actions will be kept out of federal court. The result has been that class-action plaintiffs' attorneys can evade the federal court system simply by naming (in addition to the real parties) a defendant with no connection to the class action other than shared citizenship with the named plaintiff. Blessing this practice, the U.S. Court of Appeals for the Eleventh Circuit recently considered a class action in which an Alabama citizen filed a class-action complaint against a Florida auto leasing company alleging the existence of a fraudulent pricing scheme. The Alabama plaintiff also named an Alabama auto dealership, which had no involvement in the development of the alleged pricing scheme, and which had virtually no connection whatever with any putative class member other than the single named plaintiff. Despite the conceded fact that 98 percent of the 17,000 "plaintiffs" involved in the case were unconnected to the non-diverse Alabama defendant, and therefore that the focus of virtually all—but not technically all—of the trial court's efforts would be on parties that were completely diverse, the Eleventh Circuit sent the case back to state court.[5]

The federal courts have also relied on the present diversity-jurisdiction statute's amount-in-controversy requirement—under which only cases that put more than $75,000 in issue may be heard in federal court—to keep interstate class actions out of federal court. Interpreting a previous (but fundamentally identical) version of the diversity-jurisdiction statute, the Supreme Court held in 1973 that the amount-in-controversy requirement must be met by each and every class member in a class action.[6] The Supreme Court did not address the issue of how certain categories of relief (such as attorney's fees, punitive damages, and injunctive relief) should be calculated for jurisdictional purposes, however. Unfortunately, many (though not all) lower courts have addressed this issue quite restrictively from a jurisdictional standpoint. For example, in cases where defendants have attempted to remove cases to federal court on the ground that a class-action complaint requests attorney's fees in excess of the required jurisdictional amount, a number of courts have held that the amount of fees requested cannot be attributed to all the class members, and therefore that such cases cannot be heard in federal court.[7] Similarly, in cases where defendants have attempted to remove cases to federal court on the ground that a complaint seeks punitive damages well above $75,000, courts have held that the amount of alleged punitive damages cannot be applied to the claims of all class members, and therefore have remanded such cases to state court.[8] And in cases where defend-

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[3] *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995).

[4] *See Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 403 (1821) ("It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

[5] *See Triggs* v. *John Crump Toyota, Inc.*, 154 F.3d 1284 (11th Cir. 1998).

[6] *See Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973).

[7] *See Meritcare, Inc.* v. *St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir. 1999) (citing cases); *but see In re Abbott Laboratories, Inc.*, 51 F.3d 524 (5th Cir. 1995).

[8] *See, e.g., In re Brand Name Presciption Drugs Antitrust Litig.*, 1997 U.S. App. LEXIS 22267, at *26 (7th Cir. 1997) ("the right to punitive damages is a right of the individual plaintiff, rather than a collective entitlement of the victims of the defendant's misconduct"); *Gilman* v. *BHC Se-*

Continued

ants have attempted to remove cases to federal court on the ground that a defendant's cost of complying with the injunctive relief requested by the plaintiff exceeds the jurisdictional amount, at least one federal appeals court has held that the amount-in-controversy requirement is not met and that the case therefore cannot proceed in federal court.[9]

Federal courts also have demonstrated an increasing willingness, in the absence of congressional direction to the contrary, to seek out procedural technicalities on the basis of which to decline jurisdiction even when the two statutory requirements of diversity jurisdiction are satisfied. One very recent example of this phenomenon is an unpublished remand order issued by the U.S. District Court for the District of Arizona.[10] In that case, the plaintiff filed a class-action lawsuit in Arizona state court attacking a marketing practice of an auto manufacturer. To dissuade the manufacturer from removing the case to state court, the plaintiff named an Arizona auto dealer as a defendant and declined to state the amount of damages she sought. The manufacturer removed the case, arguing that the diversity-of-citizenship requirement was satisfied because the Arizona auto dealer had no connection with putative class members other than the named plaintiff herself, and that the plaintiff's request for attorney's fees, punitive damages, and injunctive relief were all sufficient to satisfy the amount-in-controversy requirement. The district court rejected these arguments and remanded the case to state court.

Within weeks of the remand order, the plaintiff filed a sworn disclosure statement disclosing that, in fact, she would not seek any relief from or make service upon the Arizona dealer defendant. Intrigued, counsel for the manufacturer asked the plaintiff's attorney to stipulate that the plaintiff sought damages of $75,000 or less. The attorney refused to stipulate. The manufacturer therefore removed the case to federal court again, relying on the federal statute permitting re-removal of cases upon the discovery of "other paper" showing that the requirements of federal jurisdiction are met. The manufacturer pointed out that the plaintiff had expressly disclaimed any right to relief against the only non-diverse defendant, and that the plaintiff's refusal to stipulate to damages less than the jurisdictional amount gave rise to an inference that she sought damages in excess of the jurisdictional amount. The district court agreed with the manufacturer both that there now was complete diversity of citizenship, and that the plaintiff's refusal to stipulate created an inference that her claimed damages exceeded $75,000. Nonetheless, the district court remanded the case to state court, all for the exceedingly technical reason that the attorney's refusal to stipulate did not constitute "other paper" upon which removal could occur under the relevant provision of our removal statutes (28 U.S.C. § 1446(b)).

In short, because there is no clear congressional mandate permitting interstate class actions to proceed in federal court, some federal courts are straining to avoid them.

II. The Constitutional Purposes Of Diversity Jurisdiction Support The Extension Of Federal Jurisdiction To Cover Interstate Class Actions.

A. Interstate Class Actions Implicate All Three Concerns Identified By The Framers As Justifications For Diversity Jurisdiction.

Let me make clear at the outset that the decision whether or not to extend diversity jurisdiction to cover interstate class actions is a political decision, and not a constitutional one. The Constitution's only limitation on diversity jurisdiction is Article III's requirement that controversies be "between citizens of different states." The Supreme Court has regularly recognized that the decision to require complete diversity, and the decision to set a minimum amount in controversy, are political decisions not mandated by the Constitution.[11] It therefore is the prerogative of Congress to broaden the scope of diversity jurisdiction to the extent it sees fit, as long as any two adverse parties to a law suits are citizens of different states.[12]

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curities, Inc., 104 F.3d 1418, 1430 (2d Cir. 1997) (to same effect); *but see Allen* v. *R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995) (permitting aggregation of punitive damages for purposes of satisfying jurisdictional amount requirement); *Tapscott* v. *MS Dealer Serv. Corp.*, 77 F.3d 1353, 1359 (11th Cir. 1996) (same holding).

[9] *See Packard* v. *Provident Nat'l Bank*, 994 F.2d 1039, 1050 (3d Cir. 1993) ("allowing the amount in controversy to be measured by the defendant's costs would eviscerate *Snyder*'s holding that the claims of class members may not be aggregated in order to meet the jurisdictional threshold").

[10] *Dixon* v. *Ford Motor Co.*, Civ. A. 99–456 (D. Ariz.).

[11] *See, e.g., Newman-Green, Inc.* v. *Alfonzo-Larrian*, 490 U.S. 826, 829 n.1 (1989) ("The complete diversity requirement is based on the diversity statute, not Article III of the Constitution"); *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 373 n.13 (1978) (to same effect).

[12] *See State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 530–31 (1967).

In my view, extending diversity jurisdiction to cover interstate class actions is not only permissible, but desirable in light of the purposes that animated the framers of the Constitution in adopting the constitutional diversity jurisdiction principle. Diversity jurisdiction generally is thought to be premised on three considerations, each of which I discuss in turn.

THE IMPERMISSIBILITY OF LOCALITY DISCRIMINATION. Perhaps the most important reason why the framers in 1787 thought it important to replace the Articles of Confederation with a new Constitution was the conviction that a loose confederation of states was a weaker form of government, and less protective of basic liberties, than a single, unified nation. As Judge Henry Friendly explained, diversity jurisdiction was an important component in the framers' plan to create a stronger union out of the old confederation; its central purpose was (and is) to protect citizens in one state from the injustice that might arise if they were forced to litigate in the courts of another state.[13] Quoting James Madison, Judge Friendly believed diversity jurisdiction to be essential to a strong union because it "may happen that a strong prejudice may arise in some state against the citizens of others, who may have claims against them."[14] A century and a half after Madison, Justice Frankfurter put a more practical face on Madison's understanding: "It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of the state court and yet not be sufficiently apparent to be made the basis of a federal claim."[15]

A number of scholars have argued, persuasively in my view, that the problem with local bias is based not only on the existence of such bias, but also on the possibility of a perception of such bias. Chief Justice Marshall himself recognized the constitutional significance of even the perception of bias:

> However true the fact may be, that tribunals of the states will administer justice as impartially as those of the nation, to the parties of every description, it is not less true, that the constitution itself either entertains apprehensions of this subject, or views with such indulgence the possible fears and apprehension of suitors, that it has established national tribunals for the decision of controversies between . . . citizens of different states.[16]

Thus, diversity jurisdiction not only was designed to protect against bias, but to shore up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents.[17] Given this function, diversity jurisdiction should not be construed as parsimoniously as the recent federal decisions described above have done; instead, as others have recognized, the "prophylactic" function of diversity jurisdiction demands that it be extended liberally to cases in which legitimate concerns about locality discrimination might arise.[18]

In my view, these concerns are particularly weighty in the context of class actions against large, out-of-state corporations. Whatever one's view of the value of diversity jurisdiction generally (and I served as an adviser to the Federal Courts Study Committee, which expressed some doubt about the value of broad diversity jurisdiction in the modern era in the context of suits between individual citizens), there is no doubt in my mind that a federal forum which is perceived as neutral and unbiased will enhance the quality of justice in the context of large class actions against multiple parties, many of which are out-of-state corporations.

To those who would complain that this legislation would bring more cases into the federal courts, my simple answer is these interstate class actions exemplify the core purposes for which the Framers included diversity jurisdiction in the Constitution. There are plenty of other cases involving diversity jurisdiction where we could pare back to make room for these cases if necessary.

The undesirability of discrimination against interstate businesses. Part and parcel of the political failure of the Articles of Confederation was the economic failure of that regime. It had become clear by 1787 that, if individual states were permitted to enter into separate economic treaties with one another, and to impose tariffs and other restrictions on the free flow of goods across state lines, the economic health of the United States would falter. Discrimination against out-of-state business enti-

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[13] *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1928).

[14] *Id.* at 492–93.

[15] *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 316 (1943) (Frankfurter, J., dissenting on grounds unrelated to diversity jurisdiction).

[16] *Bank of United States* v. *Devaux*, 9 U.S. (5 Cranch) 61, 87 (Marshall, C.J.).

[17] *See, e.g.*, Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 Brooklyn L. Rev. 197, 201 (1982).

[18] *See* James W. Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 Tex. L. Rev. 1 (1964).

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The importance of fostering confidence in the judicial system. Last, but certainly not least, the availability of a federal forum enhances the perception among litigants and others that justice is not meted out according to what one commentator has called "the Good Ol' Boy System."[20] Northwestern University law professor Martin Redish has compared the judicial system to a baseball game, and pointed out that in the same way sports fans would not trust an umpire to call balls and strikes fairly if he were affiliated with the home team, the public cannot be expected to have confidence in a judicial system without the life tenure and other protections of the federal judiciary—a system, like that in effect in [illegible] states,[21] where judges are beholden to their constituents and campaign contributors. Litigating lawyers typically refer to this as the "home court" advantage.

One important way in which the federal courts preserve public confidence in the judicial system is by maintaining procedures designed to minimize inconsistent results. Unlike state courts, the federal judiciary has the ability to consolidate numerous similar lawsuits involving similar allegations in a single district before a single judge.[22] By contrast, related state court cases that are not susceptible to consolidation often reach differing (and seemingly random) results, permitting class-action plaintiffs' attorneys to take multiple bites at the apple in the hope that, despite a number of losses on a particular issue, they will rack up a handful of lucrative wins. One recent example of this phenomenon involved a series of cases filed in state court against Ford Motor Company concerning the quality of paint on Ford cars and trucks. All of these cases were removed to federal court, where they stayed—except for one case, which a federal district judge in Texas remanded twice to state court. The removed cases were consolidated before a single federal judge in New Orleans, where all pretrial matters were conducted in a coordinated fashion. The Texas case proceeded on its own, in state court. After the completion of years of discovery, the federal judge issued what has already become a leading opinion, denying class certification in the consolidated federal cases.[23] Reviewing an identical record, an elected state judge in Texas reached the opposite conclusion and certified a class.[24] What can litigants and the public take from such a result, other than a sense of randomness and inconsistency?

Other witnesses today and at other hearings have noted the practice followed by many state judges of simply certifying classes as a matter of course,[25] the apparent willingness of state judges to approve class settlements that seem to benefit no one other than the plaintiffs' attorneys,[26] and the fervor—demonstrated perhaps most recently in the breast-implant class litigation in federal court in Alabama and in Louisiana state court—with which state judges often advance cases that compete with previously filed (and possibly even certified) class actions in federal courts.

But in my view, the issue transcends whether individual state courts cases certifying classes are right or wrong, or what standards particular states adopt for certifying class actions. At the structural level, it is important to have the option—as we do in other areas of law—to remove cases to federal court. Removal is a brilliant innovation in our federal jurisprudence. It maintains the autonomy of states to develop their own law and their own procedures (without federal preemption) while at the same time creating a gentle incentive to keep them from going too far. The

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[19] John J. Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A. J. 433, 437 (1932); see also John P. Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Probs. 3, 27 (1948).

[20] Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, Vol. 4 (May 1, 1997) (comments of consumer advocate Stephen Gardner).

[21] See Erwin Chemerinsky, Federal Jurisdiction § 1.5 at 34 (2d ed. 1994).

[22] See 28 U.S.C. § 1407 (providing for consolidation by the Judicial Panel on Multidistrict Litigation).

[23] See *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214 (E.D. La. 1998).

[24] See *Ford Motor Co. v. Sheldon*, [illegible] S.W.2d [illegible] (Tex. App.—Austin 1998), *writ granted*.

[25] See Advisory Committee Working Papers, Vol. 3, at [illegible] (testimony of Lewis Goldfarb, Chrysler Corporation) (noting that many state judges "almost see it as their civic duty to certify classes.").

[26] See Lawrence W. Schonbrun, *The Class Action Con Game*, Regulation, Fall 1997, at 50.

existence of a removal provision creates what economists call "potential competition." Removal is like the use of economic incentives, rather than command-and-control regulation, in environmental regulation, or like a school choice voucher program that improves the public schools by giving students an option to go elsewhere. Removal does not override the states' freedom of action. It merely abolishes a monopoly and creates a kind of competitive market discipline. If a state goes too far, and its decisions are perceived by litigants as unfair for whatever reason, the litigants may go to another forum that they perceive as more neutral.

Unfortunately, in the field of class actions, the option to remove to federal court has been more apparent than real, because of the decisions regarding diversity jurisdiction discussed above. In my view, the most important provisions of H.R. 1875 are those that would make removal to federal court—which is available as a matter of course in other major litigation—available in class actions as well. As I stated above, this is important not only to insure fairness to the litigants themselves in the cases that are removed, but will, in the long run, I believe, exercise a salutary effect on improving the quality of justice in the state courts.

B. The Current Statute Is Too Blunt An Instrument To Achieve Its Purpose Of Ensuring That "Important" Cases Have An Available Federal Forum.

As I have already explained, the current diversity-jurisdiction statute contains two requirements, neither of which is constitutionally required: "complete" diversity of citizenship, and a minimum amount in controversy. Intuitively, these two requirements serve a single purpose: to ensure that "important" cases qualify for a federal forum, while protecting the federal docket from cases too trivial to merit the attention of overburdened federal judges. As the class-action explosion demonstrates, however, the current two statutory requirements are not up to their task. Perversely, under the present system, legally insignificant dispute that happens to involve citizens of different states and a minimum amount in controversy—say, a slip-and-fall case involving a Virginia citizen and a Maryland grocery story owner, or a contract dispute between a businessman in Kansas City, Missouri, and his supplier in Kansas City, Kansas—may qualify for federal diversity jurisdiction. But the Texas lawsuit against Ford Motor Company—a lawsuit that, according to the plaintiffs' attorneys, involved hundreds of thousands of class members, each with tens of thousands of dollars in alleged damages—somehow does not warrant the federal courts' time.

Clearly, this result is indefensible. It is time we realized—in academia, in the profession, and in Congress—that the two current requirements of diversity jurisdiction are simply proxies for all the underlying policies warranting a federal forum. It is true that these proxies, because they have been in force for many years, have come to be embedded in the legal culture. But there is nothing sacred—and certainly nothing constitutional—about them. They are merely proxies, and highly imperfect ones at that. More important than fealty to these proxies is that we remember the underlying purpose they are intended to serve: to provide a federal forum for cases that are sufficiently large and important, judged against the three constitutional purposes I have described above. Interstate class actions clearly are important on any measure. Accordingly, I strongly support the proposed amendments.

III. Conclusion

I appreciate the opportunity to testify today before this distinguished Committee. Please allow me to summarize. Interstate class actions are filed at a rate that increases every year. More and more, they are filed in state courts in a few states that are perceived as being particularly favorable to plaintiffs. Federal courts, lacking clear guidance from Congress, are bending over backwards to decline jurisdiction. This has created strong pressure on out-of-state defendants to settle cases. This pressure to settle class actions in state court is real, and I urge Congress to take immediate steps to restoring the right to remove to a neutral, federal forum.

Mr. PEASE. Thank you very much, Professor Elliott. Mr. Struve.

STATEMENT OF GUY STRUVE, CHAIRMAN, COMMITTEE ON FEDERAL COURTS, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Mr. STRUVE. Mr. Chairman, members of the committee, thank you for inviting me here to express the views of the Association of the Bar of the City of New York, which urges you not to enact this legislation.

The Association of the Bar is a voluntary bar association of more than 30,000 attorneys in New York City and elsewhere. It is not limited to attorneys who represent defendants, attorneys who represent plaintiffs, or even members of the private bar.

The Federal Courts Committee, which I chair and which unanimously recommended that the Association oppose this bill, consists of academics, government lawyers, plaintiffs' lawyers, and, the numerical predominance, defendants' lawyers.

The Association's position stems from a concern with federalism. We have a Federal system in which two dual sovereignties, Federal and State, each have the primary responsibility for enacting and enforcing their own laws. What this legislation would do is virtually remove all class actions from the State side of that equation and put them on the Federal side of that equation. I say that because almost every class action will meet the definition of minimal diversity, so that to avoid federalization it has to fall within three very narrowly drafted exclusions, and relatively few class actions will do that.

So, I would definitely urge the committee, if it chooses to do anything resembling this, to bear in mind that what will happen is a virtual federalization of class actions.

Now, why does the Association oppose that? Again, because of the basic concern about our Federal system, it is the Association's belief that unless you have before you a strong demonstration that State courts, in general, if not pervasively, are abusing class actions and discriminating against out-of-State defendants, you should not take this head of jurisdiction away from them. And it is our submission—again, this was the unanimous view of all the members of our Federal Courts Committee—that that demonstration has not been made.

Now, I listened this morning to the chairman's very thoughtful remarks about a juster kind of justice in the Federal courts because State judges, many of them, are subject to re-election. This again is something our committee has been studying because of a phenomenon that a lot of us have noticed in New York of late, which is that a lot of the large commercial cases which either the plaintiffs or the defendants would previously, without hesitation, have brought in Federal court or removed there, are now staying in State courts because of a recognition on both sides of the case that you get at least as efficient and just a brand of justice in the State courts, and bear in mind that in order to federalize a whole area of jurisdiction, you have to be convinced that, in general, the opposite is the case.

I know that you are very familiar with both the issues here and our position from our statement, so I will rest on that and cede the remainder of my time.

[The prepared statement of Mr. Struve follows:]

PREPARED STATEMENT OF GUY STRUVE, CHAIRMAN, COMMITTEE ON FEDERAL COURTS, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

SUMMARY

The Association of the Bar of the City of New York opposes the enactment of H.R. 1875, the Interstate Class Action Jurisdiction Act of 1999.

H.R. 1875 would work a very significant change in the federal-state balance in the handling of class actions. The Association of the Bar of the City of New York

opposes the proposed legislation because (1) the need for such a radical change in the existing federal-state balance of jurisdiction has not been demonstrated, and (2) the proposed legislation will not achieve the goals it attempts to achieve.

Section 2(1) of H.R. 1875 quotes the Third Circuit as stating that interstate class actions "implicate interstate commerce, invite discrimination by a local state, and tend to attract bias against business enterprises." To the extent that this quotation is meant to suggest that the federalization of interstate class actions is necessary because state courts have generally handled such class actions in a manner that has discriminated against out-of-state litigants, our experience does not support any such generalization.

It has been argued that federalization of class actions is necessary because state courts have been abusive in their handling of class actions. Again, our experience does not support such a generalization.

H.R. 1875 lists three categories of cases where the federal courts must refrain from exercising jurisdiction over class actions. These categories are defined in qualitative terms which would generate endless satellite litigation. Moreover, these categories do not exhaust the categories of cases in which state courts should be permitted to exercise jurisdiction over class actions.

STATEMENT

Good morning. Thank you for inviting me to express the views of The Association of the Bar of the City of New York on H.R. 1875, the Interstate Class Action Jurisdiction Act of 1999.

A. About the Association

The Association of the Bar of the City of New York was organized in 1870 "for the purposes of cultivating the science of jurisprudence, promoting reforms in the law, facilitating and improving the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession, and cherishing the spirit of collegiality among the members thereof." Ass'n of the Bar of the City of N.Y. Const. art. II. 1995 marked the 125th anniversary of the Association. The same professional and ethical traditions of civic duty shape the Association's goals today. The Association continues to work at legal reforms and their social and political ramifications and at maintaining the highest possible ethical standards for the legal profession. The Association is not currently, and has not been in the current or the preceding two fiscal years, the recipient of any federal grant, contract, or subcontract. The Association's 501(c)(3) affiliate, the Association of the Bar of the City of New York Fund, Inc., received $20,585.42 during the 1996–1997 fiscal year from the State Justice Institute to reimburse costs of an interactive video installation in the New York County Supreme Court.

The Association's Federal Courts Committee is directed "to observe the practical working of [all federal] courts and . . . to make such reports or recommendations as the Committee may deem advisable for the purpose of improving the administration of justice in such courts." The membership of the Committee includes a wide range of lawyers engaged in private practice, as well as lawyers in various agencies of government and two Federal Magistrate Judges. Of the Committee members who are in private practice, many represent defendants more often than plaintiffs, and some represent plaintiffs more often than defendants.

B. The Proposed Legislation

Legislation expanding federal court jurisdiction over class actions was introduced in both houses of the United States Congress in the last Session of Congress, and H.R. 3789 was reported out of the House Judiciary Committee on August 5, 1998. Similar legislation has been introduced in this Session as H.R. 1875 and S. 353.

This testimony is addressed to H.R. 1875, the Interstate Class Action Jurisdiction Act of 1999. H.R. 1875 would extend United States district courts' original jurisdiction under 28 U.S.C. § 1332 to include any class action where any named or putative plaintiff class member and any defendant are citizens of different states. The Act eliminates any amount in controversy requirement for any class action that meets this minimal diversity requirement. To ensure the federalization of these class actions, the Act also permits any plaintiff class member or any defendant, without any co-party's consent, to remove to federal court any putative class action that is filed in state court and that meets the minimal diversity requirement.

The Association of the Bar of the City of New York opposes this proposed legislation because (1) the need for such a radical change in the existing federal-state balance of jurisdiction has not been demonstrated, and (2) the proposed legislation will not achieve the goals it attempts to achieve.

C. The Burden to Establish a Need for the Legislation Has Not Been Met

Precluding states from hearing a substantial proportion of class actions, the Act would work a very significant shift in the federal-state balance. Before Congress undertakes such a radical reordering of the boundaries of federal and state responsibility, the proponents of the takeover must show a compelling need to disturb the current balance. The proponents of the proposed legislation have not met and cannot meet their burden to show a need—much less a compelling need—to disturb the balance between federal and state court jurisdiction over class actions.

1. Preventing Discrimination Against Interstate Enterprises

Section 2(1) of H.R. 1875 quotes the Third Circuit as stating that interstate class actions "implicate interstate commerce, invite discrimination by a local state, and tend to attract bias against business enterprises." To the extent that this quotation is meant to suggest that the federalization of interstate class actions is necessary because state courts have generally handled such class actions in a manner that has discriminated against out-of-state litigants, our experience does not support any such generalization. Nor are we aware of any evidence supporting the proposition that state courts have shown a systematic bias against out-of-state litigants in handling class actions.

Section 2(3) of H.R. 1875 characterizes the exclusion of most class actions from diversity jurisdiction as an "unintended technicality." But the requirement of complete instead of minimal diversity for federal jurisdiction is not an unintended technicality. It dates back to the opinion of Chief Justice John Marshall in *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806), and has been preserved (with the exception of the federal interpleader statute) in every subsequent enactment. *See generally, e.g.*, Charles Alan Wright, *Law of Federal Courts* § 24, at 156–58 (5th ed. 1994). We submit that no case has been made for the wholesale abrogation of this rule in class actions.

2. Applying Rigorous Standards to Avoid Abuses

Proponents of the Act assert that state courts are not rigorous in applying proper class action standards in adjudicating class actions and have created an "explosion" of unwarranted, frivolous class actions that lead to abusive settlements. H.R. Rep. No. 702, 105th Cong., 2d Sess. 6 (1998). No empirical evidence has been offered to support these assertions. At the hearings on H.R. 3789, only two studies concerning the growth in class actions were cited. These studies focussed only on an increase in the filings of class actions, not on their propriety or merit.

The Congressional Budget Office, admittedly on "highly uncertain" bases, estimated that H.R. 3789 would lead to "at least a few hundred additional cases" in the federal courts. H.R. Rep. No. 702 at 11. Based on class action practitioners' experiences, the Committee believes more than a few hundred cases may fall within the legislation's scope. Yet such estimates do raise a significant question as to any claimed "explosion." Id. at 6. On the other hand, if the proposal would siphon onto the federal courts' calendars the claimed "explosion" of complex cases each year, such an impact bodes ill for the federal courts' caseload.

Second, no empirical or other substantiation, aside from anecdotes, has been offered supporting the proposition that state courts are more lenient than their federal counterparts in adjudicating class actions. Even if this proposition were true, it would be a classic problem that principles of federalism would dictate is for the states to address. If states are not curbing abusive litigation, of any form, in their courts, the states, as a practical as well as a constitutional matter, are in the best position to effect the proper control and necessary improvements.

In any event, other than anecdotal testimony, the sole support before Congress for the claim of leniency was a study analyzing Alabama state courts' "conditional" class certifications. The Alabama Supreme Court, however, sounded what has been termed the "death knell" of conditional certifications in Alabama, issuing a series of writs of mandamus in December 1997 to vacate conditional class certifications. Both *Ex Parte State Mutual Ins. Co.*, 715 So. 2d 207 (Ala. 1997), and *Ex Parte American Bankers Life Assur. Co.*, 715 So. 2d 186 (Ala. 1997), for example, required notice and a full opportunity to be heard before class certification and strictly applied the same certification criteria as in Federal Rule of Civil Procedure 23. If anything, these examples illustrate how state courts can and do deal with any perceived abuses.

The study presented to Congress on the problem addressed by the Alabama Supreme Court also must be viewed with skepticism. A Committee member was involved in one of the cases cited. *Lewis* v. *Exxon Corp.*, No. 96–140 (Sumter Co.). The study, by Dr. John Hendricks, presents this case as involving a class certification that did not give the defendant a full opportunity to be heard. Although the court

did grant provisional certification before the record was complete, the court granted final certification only after a fuller evidentiary record had been developed, including discovery, expert testimony, and complete briefing and argument. The defendant had a full opportunity to oppose the certification. In fact, the Alabama Supreme Court decertified this action, holding that Alabama courts may not certify multistate deceptive practice suits because Alabama's deceptive practices statute does not permit class certification. *Ex Parte Exxon Corp.*, 725 So. 2d 930 (Ala. 1998).

Beyond the Alabama examples, the experience of class action practitioners, including Committee members representing both plaintiffs and defendants, shows that any greater leniency toward class certifications in the state courts in the past has subsided. Various decisions, both federal and state, have tightened class action criteria significantly. *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Small* v. *Lorillard Tobacco Co.*, 252 A.D.2d 1, *leave to appeal granted*, 252 A.D.2d 18–19 (1st Dep't 1998); *Carroll* v. *Cellco Partnership*, 313 N.J. Super. 488 (App. Div. 1998). In fact the Act's proponents have not demonstrated that abusive class settlements are a function of state rather than federal court supervision. Recent settlement agreements cited to exemplify asserted abuse were reached in federal, not state, courts. *Hanlon* v. *Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998); *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768 (3d Cir. 1995); *In re Ford Motor Co. Bronco II Products Liability Litig.*, 1995 U.S. Dist. Lexis 3507 (E.D. La. 1995).

3. Ability to Address Laws and Claimants from Other States

Other claims by the legislation's proponents are equally questionable. They have contended that state courts are "ill equipped" to address laws and claimants from outside their states. H.R. Rep. No. 702 at 1. Again, no support has been provided for this contention. State courts routinely must and do deal with issues raised by multistate parties and the applicability of other states' laws. Nor has any showing been made that federal courts are better able than state courts to apply the laws of states outside the court's jurisdiction.

Had such a problem in the state courts been shown, the problem would not be limited to class actions, but would involve any number of cases with multistate claimants and laws. To urge that in any of these situations the federal courts should take over is to set a troubling precedent for federal takeover of any problem in the state courts or at least any problem with any multistate dimensions.

4. Ability to Address Overlapping or Competing Actions in Other States

Similarly, the Act's proponents have contended that state courts are powerless to consolidate overlapping or "competing" class actions in different jurisdictions. While state courts cannot consolidate actions in different jurisdictions, state courts are not powerless to deal with overlapping or competing actions outside their jurisdictions. State courts may and do stay actions before them pending a determination in another jurisdiction, just as federal courts do. Again, no evidence has demonstrated that this approach has proved insufficient.

5. Summary

In short, the proponents of disturbing the boundaries of federal and state courts' jurisdiction bear the burden of showing a compelling need for the proposed change. The proponents of the proposed changes in class action jurisdiction have not met this burden. They have failed to establish the necessity for the legislation, much less a sufficient necessity to overcome the presumption in favor of maintaining the current federal-state balance.

D. The Legislation Poses Federalism Concerns

In both design and effect, the Act's reallocation to the federal courts of adjudicatory authority over inherently state disputes compromises the basic principles underlying our federal system of dual sovereignty, in which two governmental structures operate substantially uninhibited by each other. *E.g., Printz* v. *United States*, 521 U.S. 898, 934 (1997). Class actions, in particular, often raise novel legal issues requiring the application of state law to new situations. To the extent that class actions are a forum where state law is developed, the Act displaces state courts from their traditional and pivotal role as the primary expositors of state law. Federal courts, respecting our system of dual sovereignty, are less likely to construe, extend, or expand state law in any new way, finding it the domain of state courts to decide issues of first impression under state law. For this reason, and due to a concentration on federal issues, federal courts may not have occasion to acquire the same competence and effectiveness as state courts in developing areas of state law. The federalization of class actions envisioned by the Act thus may frustrate the development of state law.

Second, the Act impedes states' ability to devise and offer their citizens an important mechanism for vindicating their rights under state laws. While states would retain the authority to create rights under state laws, they would lose an important means for enforcing those rights and implementing those laws through the courts.

Emblematic of this problem are the Act's provisions governing cases in which the federal court denies class certification. The Act provides that any such case may be refiled in the state court, following which it can again be removed to the federal court, which will presumably dismiss all class claims on the basis of its prior decision. The net effect would be that cases in which class certification has been denied by the federal court could not be maintained as class actions in the state courts.

This direct regulation of procedural rules by which state courts adjudicate disputes raises basic federalism concerns in light of "the importance of state control of state judicial procedure." *Howlett* v. *Rose*, 496 U.S. 356, 372 (1990) (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)). *See also Johnson* v. *Fankell*, 520 U.S. 911, 916 (1997). Under the Act, a federal statute would regulate state judicial procedures by dictating requirements for state-based class actions. It would effectively forbid states from applying their class action procedures and substitute federal procedural rules for state rules. These fundamental federalism concerns raised by the Act's radical reordering of federal-state adjudicatory authority militate strongly against the legislation's enactment.

E. The Legislation Will Not Achieve the Goals It Seeks to Achieve and Will, Instead, Effect an Unwarranted Deprivation of States' Ability to Adjudicate State-Based Disputes.

Even the proponents of upsetting the federal-state balance recognize that federalism, at minimum, requires retention of state court jurisdiction over state-based class actions. As is readily apparent, however, application of the minimum diversity principle in the class action context creates federal jurisdiction of limitless bounds. For example, if even one of thousands of plaintiff class members should move to another state, even if that class member resided in the state where the claim arose when it arose, the action qualifies for federal jurisdiction. Thus the proposal's central premise of minimal diversity insulates no class action, however uniquely suited to state court adjudication, from federal jurisdiction.

The attempts to carve out escape hatches from federal jurisdiction for state-based class actions fail to produce effective categorizations of state-based actions. H.R. 1875 lists three categories of cases where the federal court must refrain from exercising jurisdiction: (1) an "intrastate case," where the claims are governed "primarily" by the laws of the forum state and the "substantial majority" of the members of the plaintiff class and the "primary" defendants are citizens of that state; (2) a "limited scope case," where the matters in controversy do not exceed $1 million; and (3) a "State action case," where "the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief."

These provisions are not self-applying. Their parameters, including especially the terms set forth in quotation marks above, are highly qualitative in nature and invite endless satellite litigation concerning these terms' interpretation and application, all before ever reaching the merits.

Moreover, these provisions do not encompass all of the cases where state jurisdiction over class actions is most appropriate. For example, a class action involving claims of more than $1 million, brought under the laws of the forum state against forum state defendants, but in which the class of allegedly injured persons was located in many states, would not come within any of the exclusions listed in H.R. 1875. Since none of the exclusions would apply, the federal court would be compelled to retain jurisdiction over the action, despite the absence of any plausible basis for claiming systematic discrimination against the forum state defendants.

The Act's flawed attempts to define state-based class actions reveal that it is impossible to draw a clean line around those types of actions. Because minimal diversity is the driving principle, nothing prevents the relocation of one class member (or one defendant seeking to defeat state court jurisdiction, for that matter) from making a class action a candidate for federal jurisdiction. In failing to define a comprehensive carve-out of cases that should be permitted to proceed as class actions in state courts, the proposals in turn fail to define effectively those class actions the proponents want specifically to target for federal jurisdiction. Hence the legislation fails to achieve its stated objectives.

Other features of the proposed legislation illustrate the disruptions it would inflict on both the state and the federal courts. The Act allows any defendant in an action, or any member of the plaintiff class who has not been named as a class representa-

tive, within a specific time after receiving notice of the action, to remove to federal court any action that could have been brought there originally. In a class action, a class member may not receive notice until the eve of settlement. Under the Act, at the eleventh hour, after a state court has nursed a class action all the way to disposition, a party still may suddenly divert the action to federal court. The unilateral ability of any class member to redirect the litigation also undermines the overarching concept in class actions, that the class representatives represent the class and determine (subject to the control of the court) how the action is to proceed.

In sum, the proposed legislation does not and cannot accurately distinguish between intrastate and interstate class actions. The impractical effects on both the federal and the state judiciaries, in addition to the implications for the deeply rooted balance between them, are evident.

F. Conclusion

For the reasons discussed above, Congress should not enact the proposed Interstate Class Action Jurisdiction Act.

Mr. PEASE. Thank you very much, Mr. Struve.

Professor Daynard.

STATEMENT OF RICHARD DAYNARD, PROFESSOR AND CHAIRMAN, TOBACCO LIABILITY PROJECT, TOBACCO CONTROL RESOURCE CENTER, NORTHEASTERN UNIVERSITY LAW SCHOOL

Mr. DAYNARD. Thank you, Mr. Chairman. I would like to comment today on the effect that H.R. 1875 would have on tobacco litigation, and hence on the public health purposes that tobacco litigation serves. In brief, whatever its motivations, H.R. 1875 would have the almost certain effect of extinguishing all class actions against tobacco companies, thereby eliminating the principal avenue for smokers to get their day in court. This would free the tobacco industry to continue what the Florida class action jury in *Engle* v. *R.J. Reynolds Tobacco Company* 2 weeks ago found was a persistent pattern of fraud, fraudulent concealments, conspiracy to commit fraud, conspiracy to commit fraudulent concealments, and intentional infliction of emotional distress. It would, in effect, give them a Federal license to lie about their deadly products, and hence a Federal license to kill. Thus, H.R. 1875 could equally well be called "The Tobacco Industry Relief Act of 1999."

Now, I know this is very strong language, but I believe it is fully justified. Here is why. Beginning with the first lawsuits against the tobacco industry in 1954 and continuing for the next four decades, the industry managed to avoid ever paying damages to a single afflicted smoker, nonsmoker, or family member. Its principal strategy was to use or abuse every possible procedural device for the purpose of discouraging plaintiffs' attorneys from bringing such cases by guaranteeing that their expenses will exceed any possible recovery.

As an attorney wrote following the dismissal of several individual cases, "the aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all of his."

To counter the tobacco industry's bankrupt-the-plaintiff's-lawyer tactics, plaintiffs' lawyers eventually began bringing class actions—in both State and Federal courts—on behalf of afflicted smokers

and nonsmokers. These class actions for the first time raised the amount of the possible recovery above the cost of bringing these cases, allowing plaintiffs' attorneys to prudently make the investment of time and money needed to even the playing field, thereby giving their clients a chance to have their cases heard on the merits. This is, indeed, the principal historic justification for rule 23(b)(3) class actions, to recruit effective advocates for injured parties who would otherwise be without redress.

Unfortunately, the Federal courts have been unwilling to permit individual tobacco victims to band together in class actions. Beginning with the fifth circuit's reversal of the trial court's class certification in *Castano*, Federal courts have uniformly refused to certify these cases. They have articulated various reasons.

Ironically, three of the reasons given cut strongly against H.R. 1875. First, the *Castano* court noted, there have been so few tobacco cases tried that it is often difficult to know how the supreme courts of the various States, the ultimate arbiters of State-based common law under the doctrine of *Erie Railroad* v. *Tompkins*, would decide various legal issues that they present. Indeed, the court repeatedly refers to the case, a national class action on behalf of all addicted smokers, as "an immature tort," and it suggests, quite reasonably, that State courts should have the first crack at addressing these State law issues.

Secondly, there is a concern that the seventh amendment may stand in the way of a viable class action trial plan, to the extent that such a plan may risk having a later jury reconsider an issue decided by a previous jury. Whether or not that concern is justified as a matter of Federal constitutional law, it is irrelevant in State class actions, since the seventh amendment has not been held binding upon the States under the 14th amendment. While various States may have similar constitutional provisions, the interpretations of those provisions are entirely a matter for the courts of each State, and may well be held less restrictive than the seventh amendment.

Third, the courts have been concerned about "the difficulties likely to be encountered in the management" of the class actions. While it is appropriate for Federal courts to exercise their discretion to decline class certification in light of such difficulties, it is not appropriate for them to decide that the cases would also be too difficult for State courts to bother with. Yet that is what the bill contemplates, that a class action could be removed from State court and dismissed because it does not meet Federal class action requirements. This would be an extraordinarily paternalistic act on the part of the Federal courts with respect to the State courts, telling them that they, the State courts, would have such difficulties running the case as a class action that they may not even try. The arrogance of this assertion becomes particularly clear if there are hundreds or thousands of named plaintiffs, rather than just a handful. Many State courts could well decide their docket control needs require the case to run as a class action, yet the bill could easily end up preventing the State from operating its court docket in a cost-efficient manner, a result that may well be forbidden by the 10th amendment.

The State court tobacco cases, on the other hand, have been proceeding well. Some have been certified, others have not. Among those certified—and I just mention three briefly here—*Broin, Scott* and *Richardson*. Let me say very briefly, if I can, the most significant class action to date is, of course, the *Engle* case, a class of nicotine-addicted afflicted smokers against the major tobacco companies and their trade organizations. Before the trial began, the case was certified by the trial court, the certification was upheld by the intermediate appellate court, and the Florida Supreme Court refused the industry's request for discretionary review. The jury completed the 9-month-long first phase of the trial on July 7th of this year, with an extremely detailed verdict finding against all defendants on all counts. The case will proceed.

The tobacco companies have, of course, noticed that they are vulnerable to class actions in State court, but not in Federal court. The primary defendants in tobacco cases are from different States, guaranteeing that there would always be minimal diversity in tobacco class actions so they will all be removable. The exception for an intrastate case would not apply, again because the requirement that the substantial majority of members all be citizens of the same State as the primary defendants. Indeed, it is even possible, I think likely, that the *Engle* case itself would be aborted under this bill. It could be removed to Federal court even at this late date.

So, in conclusion, whatever the reasons for the uniform run of Federal court decisions, and whether or not these are justified in terms of the needs, capacity, and priorities of the Federal court system, to send tobacco class actions to Federal court is to send them to their death, which is why this bill could well be entitled "The Tobacco Industry Relief Act of 1999." Thank you.

[The prepared statement of Professor Daynard follows:]

PREPARED STATEMENT OF RICHARD DAYNARD, PROFESSOR AND CHAIRMAN, TOBACCO LIABILITY PROJECT, TOBACCO CONTROL RESOURCE CENTER, NORTHEASTERN UNIVERSITY LAW SCHOOL

SUMMARY

I would like to comment today on the effect that H.R. 1875 would have on tobacco litigation, and hence on the public health purposes that tobacco litigation serves.

H.R. 1875 would have the almost-certain effect of extinguishing all class actions against tobacco companies, thereby eliminating the principal avenue for smokers to get their day in court. The federal courts are hostile to tobacco class actions, and have never permitted any to proceed. State courts, on the other hand, have been more hospitable, and two state supreme courts have already given the go-ahead for tobacco class action trials. H.R. 1875 would allow the tobacco companies to remove all tobacco class actions to federal court, thereby insuring their demise.

Through persistent abuse of the judicial process, the tobacco industry makes individual cases extremely difficult and expensive to pursue. In the 45 years since tobacco litigation began, only a few dozen cases have ever come to trial. H.R. 1875's de facto elimination of class actions would therefore produce a de facto immunity for the tobacco industry from legal accountability for its actions. This would free the industry to continue what the Florida class action jury in Engle v. R. J. Reynolds Tobacco Co. two weeks ago found was a persistent pattern of fraud, fraudulent concealment, conspiracy to commit fraud, conspiracy to commit fraudulent concealment, and intentional infliction of emotional distress. It would, in effect, give the industry a federal license to lie about their deadly products, and hence a federal license to kill. Thus, H.R. 1875 could equally well be called "The Tobacco Industry Relief Act of 1999."

STATEMENT

My name is Richard Daynard. For the past 30 years I have been a law professor at Northeastern University School of Law. For the last 15 of these years I have specialized in toxic torts and complex litigation, and especially in tobacco litigation. During this time I have been Chairman of the Tobacco Products Liability Project, which encourages such litigation as a public health strategy, and Editor-in-chief of the Tobacco Products Litigation Reporter, which follows legal developments in tobacco litigation.

I would like to comment today on the effect that H.R. 1875 would have on tobacco litigation, and hence on the public health purposes that tobacco litigation serves.

In brief, whatever its motivations, H.R. 1875 would have the almost-certain effect of extinguishing all class actions against tobacco companies, thereby eliminating the principal avenue for smokers to get their day in court. This would free the tobacco industry to continue what the Florida class action jury in Engle v. R. J. Reynolds Tobacco Co. two weeks ago found was a persistent pattern of fraud, fraudulent concealment, conspiracy to commit fraud, conspiracy to commit fraudulent concealment, and intentional infliction of emotional distress. It would, in effect, give them a federal license to lie about their deadly products, and hence a federal license to kill. Thus, H.R. 1875 could equally well be called "The Tobacco Industry Relief Act of 1999."

I know this is strong language, but I believe it is fully justified. Here is why.

Beginning with the first lawsuits against the tobacco industry in 1954 and continuing for the next four decades, the industry managed to avoid ever paying damages to a single afflicted smoker, nonsmoker, or family member. Its principal strategy was to use or abuse every possible procedural device, for the purpose of discouraging plaintiffs' attorneys from bringing such cases by guaranteeing that their expenses will exceed any possible recovery. As an attorney for R.J. Reynolds Tobacco Company wrote, following the dismissal of several individual cases, "the aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR]'s money, but by making that other son of a bitch spend all of his." Haines v. Liggett Group, Inc. 814 F. Supp. 414 (D.N.J. 1993).

To counter the tobacco industry's bankrupt-the-plaintiff's-lawyer tactics, plaintiffs' lawyers eventually began bringing class actions—in both state and federal courts—on behalf of afflicted smokers and nonsmokers. These class actions for the first time raised the amount of the possible recovery above the cost of bringing these cases, allowing plaintiffs' attorneys to prudently make the investment of time and money needed to even the playing field, thereby giving their clients a chance to have their cases heard on the merits. This is, indeed, the principal historic justification for Rule 23(b)(3) class actions: to recruit effective advocates for injured parties who would otherwise be without redress.

Unfortunately, the federal courts have been unwilling to permit individual tobacco victims to band together in class actions. Beginning with the 5th Circuit's reversal of the trial court's class certification in Castano v. American Tobacco Co., 84 F.3d 734 (1996), federal courts have uniformly refused to certify these cases. They have articulated various reasons.

Ironically, three of the reasons given cut strongly against H.R. 1875. First, as the Castano court noted, there have been so few tobacco cases tried that it is often difficult to know how the supreme courts of the various states—the ultimate arbiters of state-based common law under the doctrine of Erie Railroad v. Tompkins—would decide various legal issues that they present. Indeed, the court repeatedly refers to the case, a national class action on behalf of all addicted smokers, as "an immature tort". And it suggests, quite reasonably, that state courts should have the first crack at addressing these state law issues.

Second, there is a concern that the Seventh Amendment may stand in the way of a viable class action trial plan, to the extent that such a plan may risk having a later jury reconsider an issue decided by a previous jury. Whether or not that concern is justified as a matter of federal constitutional law, it is irrelevant in state class actions, since the Seventh Amendment has not been held binding upon the states under the Fourteenth Amendment. While various states may have similar constitutional provisions, the interpretations of those provisions are entirely a matter for the courts of each state, and may well be held less restrictive than the Seventh Amendment.

Third, the courts have been concerned about "the difficulties likely to be encountered in the management" of the class actions. While it is appropriate for federal

courts to exercise their discretion to decline class certification in light of such difficulties, see Rule 23(b)(3)(D), it is not appropriate for them to decide that the cases would also be too difficult for state courts to bother with. Yet H.R. 1875 contemplates exactly that—that a class action could be removed from state court, and dismissed because it does not meet federal class action requirements! This would be an extraordinarily paternalistic act on the part of the federal courts with respect to the state courts—telling them that they (the state courts) would have such difficulties running the case as a class action that they may not even try. The arrogance of this assertion becomes particularly clear if there are hundreds or thousands of named plaintiffs, rather than just a handful: many state courts could well decide that their docket control needs require the case to run as a class action. Yet H.R. 1875 could easily end up preventing the state from operating its court docket in a cost-efficient manner—a result that may well be forbidden by the Tenth Amendment.

The state court tobacco cases, on the other hand, have been proceeding well. Some classes have been certified, while others have not. Among those that have been certified are Broin v. Philip Morris Companies, Inc., an action by a class of nonsmoking flight attendants tried in a Florida state court in 1997, and eventually settled by the tobacco industry for a $300 million research fund, waiver of the statute of limitations, and a de facto concession in the individual follow-on cases that environmental tobacco smoke causes a variety of disease; Scott v. American Tobacco Co., 731 So.2d 189 (La. S. Ct. 1999), a class of addicted Louisiana smokers in which the Louisiana Supreme Court has approved the class certification; and Richardson v. Philip Morris Companies, Inc., a class of addicted and of afflicted Maryland smokers, certified as a class by a Maryland trial judge in January 1998 and presently under appeal in the Maryland courts.

The most significant tobacco class action to date is of course Engle v. R.J. Reynolds Tobacco Co., an action by a class of nicotine-addicted afflicted Florida smokers against the major tobacco companies, the Tobacco Institute, and the Council for Tobacco Research. Before trial began the class was certified by the trial court, the certification was upheld by the intermediate appellate court, and the Florida Supreme Court refused the industry's request for discretionary review. R.J. Reynolds Tobacco Co. v. Engle, 682 So. 2d 1100 (1996). The jury completed the nine-month-long first phase of the trial on July 7, 1999 with an extremely detailed verdict finding against all defendants on all counts. The second phase, which will establish the amount or ratio of punitive damages, as well individual damages for the named plaintiffs, will begin on September 7, 1999. The Florida courts will then determine the procedure under which the remaining class members can present their claims.

The tobacco companies have, of course, noticed that they are vulnerable to class actions in state court, but not in federal court. The "primary defendants" in tobacco cases are from different states, guaranteeing that there would always be minimal diversity in tobacco class actions, and that all such actions would therefore be removable under H.R. 1875. The exception for an "intrastate case" would not apply, again because the requirement that "the substantial majority of the members of all proposed plaintiff classes are citizens of that State of which the primary defendants are also citizens" cannot be met in tobacco class actions. Indeed, it is possible that the Engle case itself could be removed to federal court, even at this late date. Whatever the reasons for the uniform run of federal court decisions, and whether or not these are justified in terms of the needs, capacity, and priorities of the federal court system, to send tobacco class actions to federal court is to send them to their death. That is why H.R. 1875 could well be entitled, "The Tobacco Industry Relief Act of 1999."

Thank you.

Mr. PEASE. Thank you very much, Professor.

Mr. Beisner.

STATEMENT OF JOHN BEISNER, O'MELVENY & MYERS

Mr. BEISNER. Thank you. I very much appreciate the opportunity to participate in today's discussion of H.R. 1875. What I would like to do is spend a few minutes responding to some of the criticisms that have been voiced of this legislation earlier today.

First, several of those who have testified here today have said "We really don't see a problem here," and, frankly, I find that position difficult to fathom.

This is the fifth hearing that the House and Senate Judiciary Committees have now held on the subject of class action abuse, particularly abuse in the State court system, in just the last 18 months. Those hearings have yielded a mountain of evidence, including studies, case studies, hard data, and numerous anecdotes showing that there has been an explosion of State court class actions, and that serious class action abuses are occurring.

Now, one can play ostrich and pretend that those abuses are not there, but that doesn't make those abuses go away. If you doubt whether there are abuses, consider again what we are talking about. If I told you that earlier today the Senate had passed a bill that says that attorneys can file lawsuits without their clients' permission, I suspect that you would be shocked, but that is basically what class actions are. They allow attorneys to walk into court and claim that they represent thousands, and sometimes millions, of people, even though they have never met those people, have no idea if they really want to file a lawsuit, and certainly don't have their permission to sue. The opportunity for abuse is overwhelming.

There is considerable risk that the attorney bringing the lawsuit will use the action primarily to exert leverage over the defendants, as many courts have noted in recent years. And there is also considerable risk that since the class members really have little to do with controlling the litigation, the attorneys bringing the action may not act in the best interest of their client. For that reason, class actions require close, careful management. Some States do a good job in that regard. I agree that the New York courts do an exceptional job in dealing with class actions. But Federal courts generally are better equipped to handle that sort of management in terms of many factors—experience, resources, and perhaps most importantly, an interstate perspective—and the important thing to remember is that just because some States do a great job in dealing with these cases, it doesn't erase the fact that all you need are one or two States, as Professor Elliott noted, that deviate from that, and they become the "havens for class actions" generally—everyone goes there to file these lawsuits.

Second, I am deeply troubled by what seems to be a direct assault on the concept of diversity jurisdiction, and I think this has been discussed in some detail earlier, but I would just note that this is not a concept that the courts made up, it is not something that Congress created, it is in article III of the Constitution. The statements about "times have changed," and so on, may be true, may not be true, but this is a point that is in the Constitution. It is still there. It is a right. It is an authority that was established in article III of the Constitution, and that has not changed.

The third point I would like to make concerns the statement that some have made about the need for States to be allowed to experiment with class actions. I respectfully submit that there is little, if any, room for this experimentation that people are talking about. Rule 23 of the Federal Rules of Civil Procedure, which defines what is and isn't a class action in Federal courts, basically bumps up pretty close to what due process permits. This isn't just some informal procedural rule that is out there, this is a rule that is crafted along the lines of what due process permits in terms of the aggre-

gation of claims. And so this notion that there is a lot more room for experimentation out there, I would respectfully submit, is false.

The last point I would like to make is, noting the distress that some people have suggested about having these cases heard in Federal court being some form of punishment almost—and I appreciate the candor in Professor Daynard's testimony, when he explained a few minutes ago why he thinks class action should be heard in State court, not Federal court—he notes that Federal courts are required by the seventh amendment to our Constitution, to provide litigants with a fair trial, but he says that the seventh amendment "stands in the way of having some cases proceed as class actions in Federal court." The Federal courts won't let them proceed because they wouldn't be fair under the strictures of the seventh amendment. The solution, he says, is to let these cases be heard in State courts. The seventh amendment, as he points out correctly, doesn't apply to State courts and, as a result, he says, some State courts have less restrictive fair trial requirements. I respectfully submit that that is terrible policy. In essence, the argument is that this bill should be defeated so that class actions, the biggest cases in our court system, could——

Mr. BERMAN. Mr. Chairman, could the record show that what this witness is referring to seems to disagree with his interpretation of that witness' comments?

Mr. PEASE. I suspect that if the witness will comport himself appropriately, he will have the opportunity to respond at some point.

Mr. BERMAN. I appreciate that, thank you. I apologize.

Mr. BEISNER. In essence, the argument is that this bill should be defeated so that class actions, the biggest cases in our court system, the cases that put the most money at issue, that involve the greatest numbers of our citizens, and that most implicate interstate commerce, should be the exclusive purview of State courts because those courts are less solicitous—less solicitous, is the argument—of ensuring that the parties, all parties, to those cases receive a fair trial. Class actions are the cases in which the greatest care should be taken to ensure that all parties get a real day in court, and that is why those cases should be subject to the more rigorous management typically afforded by our Federal courts. Thank you very much.

[The prepared statement of Mr. Beisner follows:]

PREPARED STATEMENT OF JOHN BEISNER, O'MELVENY & MYERS

SUMMARY

In hearings over the past eighteen months, the members of this Committee and its Senate counterpart have heard considerable evidence of a severe state court class action crisis. The record reflects an explosion in the number of such cases being filed, prompted largely by a lax attitude toward class actions among some state courts. Some state courts operate without basic class certification standards and in disregard of fundamental due process requirements, resulting in injury to both unnamed class members as well as to corporate defendants. Another problem is that certain state courts are "federalizing" such litigation. By their laxity, they have become magnets for a disproportionate share of interstate class actions and are thus dictating national class action policy. Further, in litigating multistate class actions, those state courts are also frequently dictating the substantive laws of other jurisdictions. Considerable waste and inconsistent judicial rulings are occurring because there is no mechanism for coordinating overlapping, "competing" class actions (*i.e.*, cases in which the same claims are asserted on behalf of basically the same classes) pending simultaneously in state courts around the country.

Witnesses at a March 5, 1998 hearing before this Committee's Subcommittee on Courts and Intellectual Property (representing widely varied interests) expressed broad agreement that the wisest, least disruptive solution would be the expansion of diversity jurisdiction over interstate class actions, allowing more such cases to be heard in federal courts. As one witness noted, "you have heard today from professors, from plaintiff's lawyers, from defense lawyers, from consumer representatives, from business people, from a whole range. And it is striking . . . that . . . you've heard from everyone . . . that . . . increasing the ambit of . . . diversity jurisdiction . . . to [encompass more class actions] is a good idea."

H.R. 1875's jurisdictional/removal provisions would be a significant step toward resolving the state court class action crisis. They would fix a technical flaw in our current diversity jurisdiction statutes (enacted before the modern day class action) that bars federal courts from hearing most interstate class actions—the judicial system's largest lawsuits, often involving millions of dollars disputed among thousands of parties residing in multiple jurisdictions. This change would also make more broadly available the statutory mechanisms by which federal courts (but not state courts) may coordinate overlapping, competing class actions. Those provisions would allow both plaintiffs and defendants greater access to our federal courts without undesirable side effects. The bill would not alter any party's substantive legal rights. The bill would leave purely local disputes to the exclusive purview of state courts. And the bill would still allow state courts to hear class actions when parties prefer that forum.

STATEMENT

Thank you for the opportunity to participate in today's discussion of H.R. 1875, the "Interstate Class Action Jurisdiction Act of 1999."

Let me begin by disclosing the sources of my perspectives and inherent prejudices on this subject. Basically, I am an "in-the-trenches" class action litigator. Over the past 19 years, I have been involved in defending over 250 class action lawsuits on a wide variety of subjects before the federal and state courts of 28 states at both the trial court and appellate level. On the basis of that experience, I wish to share a few thoughts about the problems that exist in the class action arena and about the respects in which I believe that H.R. 1875 would be a positive, effective response to those problems.

I. There is a Continuing State Court Class Action Crisis.

Ironically, although class actions are probably one of the most complex procedural devices in our legal system, the general public has an acute awareness of what they are. From the citizen perspective, class actions are not always pretty. Jury researchers—the people who survey potential jurors in anticipation of trials—will tell you that in many locales, the public tends to view class actions as a blight on our legal system. Citizens correctly perceive that not all class actions are bad. But if you ask for a definition of a class action in those jury research settings (as I have on occasion), you will probably get an answer like: "Class actions are lawsuits in which the lawyers get all of the money and the people don't get anything." And you will also be told that class actions are usually lawyer-manufactured. The public senses that these lawsuits do not get started like a normal lawsuit does—a person walking into the lawyer's office seeking redress for an injury. Instead, the public perceives that class actions are initiated when a lawyer gets an idea about filing a lawsuit (*e.g.*, by reading a newspaper article) and then goes off to find somebody to front the lawsuit (*i.e.*, the named plaintiff or class representative).

I do not mean to suggest that Congress should legislate in this highly technical legal arena based on such perceptions. But the reality is that these perceptions are disturbingly accurate. And those perceptions of class actions are adversely skewing the public view of our legal system as a whole. Because of their size and scope, class actions receive disproportionate amounts of press attention. But even more significantly, class actions regularly touch more citizens than virtually any other aspect of our legal system. Indeed, given the proliferation of class actions in recent years, each of us sitting in this room—whether we know it or not—is a class member in numerous pending class actions. If you have ever bought a product or used a service, there are multiple class actions on file in which somebody is supposedly trying to vindicate your rights in some way. And because of the notice rules, citizens get a lot of mail about these cases—the only mail that most people ever get from a court. Most of the legalese that they see in those notices, they do not fully comprehend. But what they do understand is that their rights are often being manipulated to benefit other interests.

To understand the class action abuse problem, one need only consider for a moment the general concept that we are discussing. If I told you that the Senate had

just passed a new bill that would allow lawyers to bring lawsuits without first obtaining permission from the parties on whose behalf the lawsuit supposedly was being brought, you presumably would be shocked. How could the Senate possibly conclude that we should allow lawyers to bring lawsuits not authorized by the claimants?

Rightly or wrongly, that's exactly what class actions are. They are a giant anachronism. In the midst of a legal system in which individual rights are paramount—a system in which a lawyer normally cannot do much of anything without the informed consent of his or her client—we have this device through which a lawyer can walk into a court and say: "I am bringing claims on behalf of millions of people, even though I don't know exactly who or where they are and even though I have not obtained their permission to bring this lawsuit on their behalf."

Clearly, such a device invites abuse. It authorizes lawsuits in which the claimants play little or no role; lawsuits in which the lawyers call all of the shots without really even hearing the views and desires of their clients. Further, it allows attorneys to bring lawsuits where the real parties in interest have manifested no interest in suing. Plainly, such lawsuits present great risk that the lawyers who bring them will substitute their interests for those whose claims are at issue. In short, class actions are a powerful, abuse-inviting device that must be carefully policed by the courts to avoid legal catastrophe. Unfortunately, at least in many of our state courts, that careful supervision is not occurring.

A. Congress Has Already Amassed An Ample Record Of Class Action Abuse.

This hearing is not the first occasion on which Congress has received indications of state court class action abuse. Over the past eighteen months, Congress has been bombarded with warnings that something is badly amiss with class actions. Alarm bells are ringing. Almost daily, there are press reports about class actions being used to deny (not protect) due process rights—instances in which the legitimate interests of *both* class members *and* defendants are being ignored or injured.

Last year, the Subcommittee on Courts and Intellectual Property of this Committee held two such hearings (one in March and another in June). And in October 1997 and again in early May of this year, the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary held hearings on that subject. The record that emerged from those four sessions indicates that the alarm bells are ringing for good cause: state court class action abuse is rampant.

Those hearings amply documented several serious problems:

- Some courts (particularly state courts) are not properly supervising proposed class settlements. The result is that class counsel become the primary beneficiaries; the class members (the persons on whose behalf the actions were brought) get little or nothing—or worse. For example, at all three hearings last year, there was discussion of the now infamous *Bank of Boston* class action settlement. At the Senate Subcommittee's October 1997 hearing, both Senator *Herb Kohl (D.-Wis.)* and his constituent, *Martha Preston*, a member of the class, described the settlement as a "bad joke."[1] At the March 1998 House hearing, *Ralph G. Wellington*, a Philadelphia attorney, elaborated, noting that the state court in that case approved a class settlement under which

  > [m]ost of the 700,000 [class members] received minimal direct economic benefit; some received no direct benefit at all. Indeed, most had their mortgage escrow accounts . . . deducted in order to pay several million dollars to the class counsel who had been approved to protect their interests. In short, having been included in a lawsuit they never envisioned, they had their own money from their own escrow accounts taken to pay class counsel for what many believe to have been a very dubious benefit.[2]

  At the Senate Subcommittee's May 4 hearing on class actions, Sen. Kohl added a postscript to this amazing story. He noted that Ms. Preston "and other [class members] sued the class lawyers." But that suit was "turned away on a technicality . . ., even though Judge Easterbrook and other [federal judges] blamed the class lawyers for 'pulling the wool over the state judge's eyes.'" But that's not all. Sen. Kohl reported that "[a]dding insult to injury, the [class] lawyers [then] turned around and sued [Ms. Preston] in Alabama—a state she [had] never visited—and demanded an unbelievable $25 million." "So not only did [Ms. Preston] lose $75, she was forced to defend

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[1] Opening Statement of Sen. Herb Kohl, *Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees*, S. Hrg. 105–504 (Oct. 30, 1997).

[2] Unless otherwise noted, quotations attributed to witnesses at the "March 1998 Hearing" are from the prepared statements of those persons submitted for the hearing.

herself from a $25 million lawsuit. . . . [I]n the words of Woody Allen, 'this is a travesty of a mockery of a sham of justice.'"[3]

- According to several sources, there has been an explosion in the number of state court class actions in recent years. Witnesses tied this phenomenon to the tendency of certain state courts to have an "anything goes" attitude toward class actions. At the March 1998 House hearing, *Rep. James Moran (D.-Va.)* observed that "[o]pportunistic lawyers have identified those states and particular judges where the class action device can be exploited." And offering specific examples, he decried the fact that "legitimate business enterprises . . . are being severely harmed by existing class action practice" and that "[i]n other cases, where businesses may be legitimately at fault, injured consumers receive little, while the plaintiffs attorneys are enriched." Similarly, *John W. Martin, Jr.*, then the Vice President-General Counsel of Ford Motor Company, observed that "[t]he real purpose of the vast majority of class action lawsuits is to make money—not for consumers, but for the lawyers bringing the suit." Noting specific state court examples, he urged that "[a]s a result, consumers are exploited and rarely receive substantial awards, while class action counsel frequently walk away with millions."
- The lax attitude toward class actions manifested by some state courts has constitutional (due process) ramifications. For example, Mr. Martin cited cases in which state courts had engaged in "drive-by class certification[s]"—situations in which judges "grant[] plaintiffs' motion to certify his claims for class treatment *before* the defendant even has a chance to respond to the motion (or, indeed, has even been served with the complaint)."
- He also expressed concern about the "'I never met a class action I didn't like' phenomenon"—state courts that "employ standards that are so lax that virtually every class certification motion is granted, even where it is obvious that the case cannot, consistent with basic due process principles, be tried to a jury as a class action." He cited examples of cases in which state courts had certified classes that federal courts had found uncertifiable. In some of those cases, the federal court cited due process or other constitutional reasons for finding class certification inappropriate; yet, the state courts charged ahead.
- Because the class action device is such a powerful tool, it can give an attorney unbounded leverage. *John L. McGoldrick*, Senior Vice President and General Counsel of Bristol-Myers Squibb Company, observed at the March 1998 House hearing that where class actions are not properly controlled by the courts handling them, there can be "the perverse result that companies that have committed no wrong find it necessary to pay ransom to plaintiffs' lawyers because the risk of attempting to vindicate their rights through trial simply cannot be justified to their shareholders. Too frequently, corporate decisionmakers are confronted with the implacable arithmetic of the class action: even a meritless case with only a 5% chance of success at trial must be settled if the complaint claims hundreds of millions of dollars in damages."
- The fundamental problem is the failure of some state courts to manage class actions so as to avoid the considerable potential for abuse. Rep. Moran testified that "[m]any state courts lack the complex litigation training, experience and resources necessary to deal with [interstate class actions]" and that "state court judges, who are elected in most states, are more prone to bias when the defendant is a large, out of state corporation." As Mr. McGoldrick put it, "[i]n some places, state court judges do not appreciate the raw power of the class action device and the need to circumscribe its usage. As a result, the rights of both defendants and the class members on whose behalf the actions were brought get ignored."
- This situation has encouraged the all too frequent filing of frivolous class actions in state courts. For example, Mr. Martin offered specific examples illustrating that due to the erosion of state court class action standards, "class actions that are being filed assert claims that are utterly without merit (or marginal at best)." And he noted that in interviews conducted for a study on class actions by the RAND Corporation's Institute for Civil Justice, "many attorneys (including some plaintiffs' counsel) observed that 'too many non-meritorious [class action lawsuits] are [being] filed and certified' for class treatment."
- The current situation in which class action litigation is being focusing in state courts is resulting in enormous waste, inconsistent results, and the risk of

[3] Oral Statement of Sen. Herb Kohl, S. 353: *"The Class Action Fairness Act of 1999,"* S. Hrg. No. J–106–22 (May 4, 1999).

harm to class members' interests. More specifically, both Mr. McGoldrick and Mr. Martin noted the problems created whenever overlapping or "copycat" class actions are filed, a frequent occurrence. When such "copycat" cases are pending in different federal courts, they may be consolidated before a single judge through the Judicial Panel on Multidistrict Litigation, thereby ensuring uniform management of the litigation and consistent treatment of all legal issues. But when duplicative class actions are filed in two or more state courts in different jurisdictions, the "competing" class actions must be litigated separately in an uncoordinated, redundant fashion because there is no mechanism for consolidation of state court cases. As a result, state courts may "compete" to control the cases, often resulting in harm to all parties involved. Counsel also "forum shop," going from court to court trying to obtain a different result on class certification or other issues. And class counsel in the various cases may compete with each other to achieve a settlement, a phenomenon that can work to the disadvantage of the class members.

- Mr. Martin observed that "[t]he 'anything goes' mentality in state courts has led to a sad reality: as a practical matter, the most important question determining the outcome of a class action lawsuit has now become, not the merits of the claims or the propriety of class treatment, but whether the case can successfully be removed to federal court." He then offered numerous examples of ways in which lawyers who file class action lawsuits manipulate their pleadings to keep their purported class actions out of federal court:
  - Counsel sometimes file complaints that, when read fairly, give rise to a claim under a federal statute, thereby qualifying the case for federal question jurisdiction. To disguise that fact, the complaint will omit any explicit reference to the federal claim or will expressly disclaim any intent to pursue an available federal claim.
  - In potential diversity jurisdiction cases, lawyers who want to keep a class action out of federal court often manipulate the parties in an attempt to destroy complete diversity. Under traditional principles of diversity jurisdiction as applied to class actions, the requisite "complete diversity" exists only if the state of citizenship of all named plaintiffs is completely different than the state of citizenship of all named defendants. To destroy "complete diversity," lawyers whose primary target is an out-of-state deep-pocket corporation sometimes name a token defendant (*e.g.*, an employee or dealer of the corporate defendant), who resides in the same state as one or more of the named plaintiffs. The inherently fraudulent nature of this tactic is obvious: although all putative class members may conceivably have a claim against the defendant corporation, few (if any) of the putative class members have had any dealings with the token in-state defendants, meaning that there is no basis for a classwide judgment against those defendants. The corporation is the only real defendant; the others are there simply to prevent removal of the action to federal court.
  - In an alternative strategy for defeating "complete diversity," lawyers bringing a nationwide or multi-state class action sometimes go out of their way to include a named plaintiff who is a citizen of the same state as the defendant. For example, in filing their Texas court lawsuit against a New York corporation, counsel may toss in a New York named *plaintiff*. Again, the intent to manipulate is clear. Why would a New York resident with a grievance against a New York corporation go all the way to Texas to file his/her lawsuit?
  - The "amount-in-controversy" prong of the federal diversity jurisdiction requirement is also the subject of frequent games. The U.S. Supreme Court's ruling in the *Zahn* case has been interpreted as holding that in a purported class action, the "jurisdictional amount" requirement (now $75,000) is met only if each and every putative class member's individual claim is worth that amount.[4] Exploiting this general rule, class action complaints often declare over and over again that all putative class members seek less than the jurisdictional amount (sometimes $74,999) or waive any right to enhanced damages (*e.g.*, punitive damages). (These kinds of "claims-shaving" tactics raise disturbing issues of adequacy-of-representation and due process. While a single plaintiff suing in his own name may limit his claims in order to stay in state court, counsel seek-

[4] *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1974). *See* n. 27 *infra*.

ing to represent a class have a fiduciary obligation to the absentee member of the class, making it improper to unilaterally "waive" claims with no authorization from the claimants.)[5]

A. The State Court Class Action Crisis Has Not Abated.

Little has changed since last year's class action-related House hearings, except that we now have more data confirming that the state court class action crisis is for real. Most notably, a new publication—*Class Action Watch*—printed earlier this year the results of a survey of major company experiences with class actions.[6] In particular, the survey found that the number of class actions pending against the responding companies had increased dramatically over the ten-year period 1988–1998. As indicated by other data collection efforts, that growth was most pronounced among state court class actions. Over the ten-year period, the number of state court class actions pending against the respondents rose by *1,042%*—a greater than *ten times* increase.[7] In contrast, the growth of pending federal cases was substantially less—only around 338%.[8]

The survey also provided strong support for the contention that if state courts in a particular locale begin manifesting an "laissez-faire" attitude toward class actions, they will become a magnet for such matters. For example, the survey noted that for years, the level of class action activity in Texas was relatively low. But of late, some Texas intermediate appellate courts have issued class certification-related decisions suggesting that Texas courts have a lower threshold for class certification than do our federal courts (even though Texas has adopted the federal class action rule and supposedly follows federal class action precedents). The effects of these decisions are not surprising. While the surveyed companies had experienced a *110%* growth in the number of pending Texas state court class actions in the five-year period 1988–1993, that growth recently has accelerated dramatically.[9] In the more recent five-year period (1993–1998), those companies reported a *338% increase* in the number of class actions pending against them in Texas state courts.[10]

The survey also indicated that as the Texas courts seemingly became less rigorous about class actions, they were more frequently being called upon to hear class actions involving non-Texas residents. For example, the survey noted that both in 1988 and 1993, certified classes were almost always confined to Texas residents.[11] By 1998, however, nationwide class actions were relatively common in Texas state courts.[12]

B. Other Problems With State Court Class Actions Are Emerging.

Over the past year, several other problems attributable to state court class actions have become increasingly apparent. I would like to focus on just two:

1. Overly Broad Classes Put Class Member Rights At Risk. For the obvious financial reasons, counsel try to make their classes as all encompassing as possible. In short, why sue for a class of 1,000 people when you can sue for a class of 20 million people? The larger class provides much more leverage against the defendant. And it creates the potential for a much larger pot of attorneys' fees (with no significantly larger investment).

The problem with this approach is that it causes the entire lawsuit to proceed on a lowest common denominator basis. The "average" claim becomes the claim by which the entire action is judged; class members with larger, more serious claims are simply lumped into the group and not given individual attention. Further, to make the litigation work as a class action, class counsel begin "shaving" (*i.e.*, waiving) the more complicated claims that may preclude trying the matter on a class basis. For example, certain legal theories requiring individual proof (*e.g.*, fraud claims requiring individual demonstrations of reliance) may be thrown overboard. Likewise, claims for certain types of injuries (*e.g.*, personal injury, property damage) may be excluded from the scope of the action. These "shortcuts" can be devastating for certain class members.

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[5] *See* n. 16 *infra*.

[6] *Analysis: Class Action Litigation—A Federalist Society Survey*," Class Action Watch (Federalist Society Litigation and Practice Group, Class Action Subcommittee) at 1 (Vol. 1, No. 1).

[7] *Id.* at 5.

[8] *Id.*

[9] *Id.* at 7.

[10] *Id.*

[11] *Id.* at 8.

[12] *Id.* The survey also contains data supporting the view of Mr. McGoldrick and others noted above that class actions provide extraordinary leverage to force settlements, regardless of whether those settlements make sense for either the class members or the defendants. *Id.* at 7–8.

For example, I note a class action lawsuit filed several months ago that has garnered considerable attention—the infamous "toothbrush" class action. According to a press release, this lawsuit, which is pending in state court in Chicago, assails the American Dental Association and several toothbrush manufacturers for failing to warn of the risk of a toothbrush-related injury known as "toothbrush abrasion"[13] According to a press report, the "hard evidence" that backs this lawsuit is, in significant part, a toothpaste commercial that claimed that 36 million people brushed their teeth too hard.[14] I suspect that a lot of people have reacted to this lawsuit in the manner of one letter to the editor:

> I wonder if one can sue this attorney and his client for being abrasive and irritating. Any attorneys out there want to take up the challenge? We could make it a class-action suit against all ridiculous lawsuits such as this.[15]

Admittedly, I know little about this lawsuit. But if it is like most actions of this general type, the proposed class includes (a) a few people who actually claim to have suffered physical injury and (b) millions of people who simply claim to be at risk of injury. This paradigm poses two major problems. The people who claim actual injury are going to get lost in the lawsuit. If the matter actually gets adjudicated or settled on a class basis, the focus will be on the biggest group—the people who supposedly are just "at risk." If the case is tried, the jury likely would find for the defendants under this apparently bizarre theory. Or if the case is adjudicated in plaintiffs' favor or is settled, the remedy will focus on the "at risk" group (*e.g.*, something like warnings and/or new toothbrushes). But what happens if somebody out there actually sustained physical injury? What if there actually are a few people who rightfully should have been warned by a dentist that they have a very rare dental situation requiring an unusual dental hygiene regimen?

Unless those persons are properly notified of what is going on in the lawsuit and closely follow the content of the notices (assuming that is possible), they will be out in the cold. If the case is tried and the class loses, their rights to pursue their claims for actual injury likely will be extinguished. Or even if plaintiffs win or obtain a settlement, the relief probably will not address their actual injury at all. And they will not be able to obtain individualized relief because the class victory or the settlement will preclude them from seeking more.

In some cases, class counsel seek to avoid these potential results by excluding people who actually have sustained personal injury, limiting the purported class to people who are merely at risk. But that approach creates another similar problem. If the case proceeds on a class basis and the class loses, all of the class members probably will be precluded from pursing claims if in fact they do experience actual injury in the future, in which case they may have a more compelling individual case to present to a jury. (For example, in the toothbrush case, if a jury found the warnings defendants provided to be adequate, each class member presumably would be precluded from arguing to the contrary in a future personal injury.) Likewise, if the case is resolved (by settlement or trial) on the basis of minimal relief, each class member likely would be precluded from later asserting claims against the defendants if the risk came to fruition—if they discover later that they have actually experienced dental injury of some sort.

Federal courts have become sensitive to this problem and increasingly have refused to proceed with class actions that put class members' rights at risk in this manner.[16] In contrast, state courts generally have been oblivious to this problem. Indeed, I am not aware of any state court that has even attempted to address this issue.

2. State Courts Are "Federalizing" Substantive and Procedural Law. I have heard criticisms that H.R. 1875 would "federalize" all class actions. That criticism over-

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[13] The attorneys who brought the lawsuit have even set up a website regarding the action—at "www. toothbrush.com." Among other things, it advises that if one suspects that he/she has toothbrush abrasion, they should "[f]irst, take care of your health" and then second, call for more information about the lawsuit at 1–877–SORE GUMS.

[14] *Not Too Abrasive, But Suit Causes Ache*, Chicago Tribune, April 14, 1999, at Business 1.

[15] *Rubs the Wrong Way*, Chicago Sun-Times, April 22, 1999, at 30. *See also* George Will, *The Perils of Brushing*, Newsweek, May 10, 1999, at 92 ("This suit is just part of a great American growth industry—litigation that expresses the belief that everyone has an entitlement to compensation for any unpleasantness. . . .")

[16] *See, e.g., In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 368 (E.D. La. 1996) (denying class certification because requested relief "does not encompass death, injury, property damage or other consequential damage"; noting that "by attempting to tailor their action in such a way as to improve their ability to establish commonality, class representatives may in fact create an adequacy problem"); *Feinstein* v. *The Firestone Tire and Rubber Co.*, 535 F. Supp. 595, 600–01 (S.D.N.Y. 1982).

looks a perversity of the current class action landscape—class actions have already been federalized *by the state courts*.

When I say "federalized," I do not mean that the *federal* government has come in and told states what they are supposed to do. What I am talking about is "false federalism"—the current situation in which one state court goes around telling the other 49 state courts what their laws should be. When state courts preside over class actions involving claims of residents of more than one state (especially nationwide class actions) as they are increasingly inclined to do, they end up dictating the *substantive* laws of other states, sometimes over the protests of officials in those other jurisdictions.

An example of this phenomenon is a class action now pending in the state court for Coosa County, Alabama.[17] That suit was brought on behalf of the over 20 million people who have certain types of airbags in their motor vehicles. The lawyers therein are asking that the court order that the design of those federally-mandated airbags be declared faulty. That court may be the ablest and the most conscientious in our judicial system. But from a federalism policy standpoint, this situation defies logic. Why should an Alabama state court tell 20 million people in all 50 states what kind of airbag that they may have in their cars? Why should that county court be telling 50 other states what their laws are on the myriad issues that are presented by this lawsuit? What business does an Alabama state court have in presiding over this purportedly nationwide action when fewer than 2% of the claimants are Alabama residents and none of the out-of-state defendants even do business in the court's district? That Alabama court is accountable only to the 11,000 residents of the county that elects the court. Nevertheless, if counsel in that case have their way, that court will be dictating national airbag policy.

Under the current situation, *procedural* class action law has also been federalized to a large extent—in the same perverse way. Even though only a minority of state courts are routinely failing to exercise sound judicial judgment on class action issues, those courts have become magnets for a wildly disproportionate share of the interstate class actions that are being filed. In short, attorneys file their class actions in the minority of courts that are most likely to have a "laissez-faire" attitude toward the class device. That distinct minority of state courts are essentially setting the national norm; they are effectively dictating national class action policy.

The new *Class Action Watch* testimony (discussed previously) tends to confirm this observation. But anyone doubting that this phenomenon is occurring need look no further than the testimony of *Dr. John B. Hendricks* at the March 1998 House hearing. He offered a docket study of state court class actions in one jurisdiction showing (a) that class actions had become disproportionately large elements of the dockets of some county courts, (b) that many of the class actions were against major out-of-state corporations lacking any connection with the forum county, and (c) that the proposed classes in those cases typically were not limited to in-state residents and often encompassed residents of all 50 states. Dr. Hendricks identified one state court judge who had granted class certification in 35 cases over the preceding two years. As Dr. Hendricks stated, "[t]hat's a huge number of cases when one considers that during 1997, all 900 federal district court judges in the United States combined certified a total of only 38 cases for class treatment." The study failed to uncover any instance in which that judge had ever denied class certification. Clearly, that court alone was playing a radically disproportionate role in setting national class action policy.[18]

II. H.R. 1875 is a Modest, Well-Reasoned Answer to the State Court Class Action Crisis

From the record now before Congress, one could develop strong support for far reaching (some would say "radical") responses to the state court class action crisis. For example, Congress could enact federal legislation simply prohibiting state courts from using the class action device at all. Or Congress could perform major surgery on the class device itself (*e.g.*, change procedural rules to allow class actions to be used only to pursue injunctive relief (not monetary damages) and thereby eliminate the economic incentives that encourage abuse of the device).

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[17] This lawsuit is captioned *Smith* v. *General Motors Corp., et al.*, Civ. A. No. 97-39 (Cir. Ct. Coosa County, Ala.). Although the trial court initially certified a nationwide class in this action before the defendants were even served, the court subsequently lifted that order.

[18] Over the past year, the Alabama Supreme Court has issued several rulings that may dampen this behavior. But when such action is taken in one state, counsel simply move the class action show to another jurisdiction where the courts have shown a lax attitude toward regulating the class device.

Instead, H.R. 1875 charts a minimalist course, proposing very modest changes. Nevertheless, its approach should be effective in addressing many of the most serious class action problems that have been identified.

At the March 1998 House hearing, the witnesses were asked their views about a suggestion that the state court class action crisis could be quelled by expanding federal diversity jurisdiction to accommodate more class actions with interstate implications:

- *Prof. Susan Koniak*, a member of the faculty at the Boston University Law School who described herself as being from the "plaintiffs' bar," responded that expanding federal jurisdiction over class actions would be

  > a good idea. There's the polybutylene pipe case, which is one of the biggest class actions, was in Union City, Tennessee, in the state court, where no one could get there, you couldn't fly in to object. And that's common. Often these [state] courts are picked, and they are in the middle of nowhere. You can't have access to the documents and I don't think it's a full answer, but I think it should be done.[19]

- Former U.S. Attorney General *Dick Thornburgh* concurred, noting that

  > [m]ost of the complaints that arise out of alleged inequitable treatment in these suits in state courts are in states where the judges are elected, and must . . . depend on contributions which come from potential party litigants.

  He stated that an expansion of federal jurisdiction over class actions is warranted because "federal courts have shown a much greater propensity to bring some sensible adjudication to the creation of classes and the progress of class cases."[20]

- In her prepared oral remarks, *Elizabeth Cabraser*, a leading plaintiffs' class action attorney, opined that

  > much of the confusion and lack of consistency that is currently troubling practitioners and judges and the public in the class action area could be addressed through the exploration, the very thoughtful exploration, of legislation that would increase federal diversity jurisdiction, so that more class action litigation could be brought in the federal court. Not because the federal courts necessarily have superior judges, but because the federal courts have nationwide reach; they have the statutory mechanisms that they need to manage this litigation, so litigation can be transferred and coordinated in a single forum.[21]

- Both *Mr. Martin* and *Mr. John Frank* indicated their support for expanding federal diversity jurisdiction over purported class actions. And *Mr. McGoldrick* concluded the inquiry by telling the Subcommittee:

  > [Y]ou have heard [today] from professors, from plaintiff's lawyers, from defense lawyers, from consumer representatives, from business people, from a whole range. And it is striking to me that those of us who frequently disagree—my friend Ms. Cabraser and I frequently disagree—but you've heard from everyone the notion that diversity jurisdiction, increasing the ambit of it to permit class actions, is a good idea. And it seems to me that that's something this committee should weigh heavily in its deliberations.[22]

H.R. 1875 embraces the simple, elegant response to the state court class action crisis embraced by this diverse group of witnesses—a correction of the fact that federal courts lack jurisdiction to adjudicate interstate class actions, lawsuits that typically involve millions of dollars in dispute among thousands of parties residing in multiple jurisdictions. That change would aid resolution of the current state court class action crisis by eliminating restrictions that have forced both unnamed class members and defendants to have their claims heard before some tribunals that are ill-equipped to handle complex litigation and otherwise less vigilant about due process rights. Further, as Ms. Cabraser noted at the March 1998 House hearing, the change would make available in most class actions the "statutory mechanisms" that federal courts (but not state courts) may wield "to manage [class] litigation," so that overlapping, competing class actions "can be transferred and coordinated in a single

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[19] *See* Federal News Service Transcript, *Mass Torts and Class Actions: Hearing before the Subcomm. on Intellectual Property and the Courts, House Comm. on the Judiciary* (March 9, 1998), at 19 ("FNS Transcript").

[20] *Id.* at 19–20.

[21] *Id.* at 33–34.

[22] *Id.* at 42.

forum."[23] And most importantly, the change would contribute to greater uniformity in the standards for deciding whether a controversy may be afforded class treatment.

As drafted in H.R. 1875, this solution would be implemented without undesirable side-effects. The bill would not alter any party's substantive legal rights. The bill would not permit removal of truly local disputes; such matters would remain within the exclusive purview of the relevant state courts. And the bill would not preempt state courts' authority to hear class actions of any sort; if the parties prefer to litigate a particular interstate class action before an appropriate state court, they may do so.

The jurisdictional changes envisioned in H.R. 1875 are entirely consistent with the current concept of federal diversity jurisdiction. At present, the statutory "gatekeeper" for federal diversity jurisdiction—28 U.S.C. § 1332—essentially allows invocation of diversity jurisdiction in cases that are large (in terms of the "amount in controversy") and that have interstate implications (in terms of involving citizens from multiple jurisdictions). By nature, class actions typically fulfill these requirements. Because they normally involve so many people and so many claims, class actions invariably put huge sums into dispute and implicate parties from multiple jurisdictions. Yet, because section 1332 was originally enacted before the rise of the modern day class action, it did not take account of the unique circumstances presented by class actions. As a result, that section, as a technical matter, tends to exclude class actions from federal courts.[24] That omission would be corrected by H.R. 1875.

H.R. 1875 would make this correction by amending 28 U.S.C. § 1332 (the diversity jurisdiction statute) to extend federal diversity jurisdiction to cover any class action (with an aggregate amount in controversy in exceeding $75,000) in which there exists "partial diversity" between plaintiffs (including all unnamed members of any plaintiff class) and defendants, an approach wholly consistent with Article III of the Constitution.[25] This expanded jurisdiction, however, would not encompass disputes that are not interstate in nature—cases in which a class of citizens of one state sue one or more defendants that are citizens of that same state would remain subject to the exclusive jurisdiction of state courts. Further, federal courts would be required to abstain from hearing certain local cases and state action cases. Thus, contrary to what has been argued by some critics, the bill would not move all class actions into federal court. Consistent with existing diversity jurisdiction precepts, it

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[23] *See* 28 U.S.C. § 1407 (statute providing for transfer and consolidation of actions through multidistrict litigation mechanism).

[24] At present, class actions not presenting federal questions often may not be brought in or removed to federal courts under diversity jurisdiction theories because of two U.S. Supreme Court decisions interpreting section 1332. First, in *Snyder* v. *Harris*, 394 U.S. 332, 340 (1969), the Court ruled that in determining whether the parties satisfied the diversity prerequisite, a court should look only to the named parties (ignoring the unnamed class members). That ruling allows class proponents to avoid federal diversity jurisdiction by naming as plaintiffs parties who are non-diverse with a defendant, even though a significant number of the unnamed class members (if not the vast majority of class members) do not share the defendant's citizenship. Second, in *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), the Court held that the "amount in controversy" requirement in section 1332 is satisfied in a purported class action only if each and every member of the purported class is shown separately to satisfy the jurisdictional amount thresbold (presently $75,000). That ruling means that even though class actions invariably are huge controversies, involving millions (or billions) of dollars of claimed damages, they cannot be heard in federal court. For example, an action involving 100,000 class members may put millions of dollars at stake, but it would not be subject to federal jurisdiction unless each class member had $75,000 at issue or a total of $7.5 billion for the purported class!

[25] *See, e.g., State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 530–31 (1967) ("in a variety of contexts, [federal courts] have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens"). In *State Farm*, the Court noted that the concept of "minimal diversity" providing the basis for diversity jurisdiction in the class action context had already been discussed in *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921). On several subsequent occasions, the Court has reiterated its view that permitting the exercise of federal diversity jurisdiction where there is less than complete diversity among the parties is wholly consistent with Article III. *See, e.g., Carden* v. *Arkoma Associates*, 494 U.S. 185, 199–200 (O'Connor, J., dissenting) ("Complete diversity . . . is not constitutionally mandated."); *Newman-Green, Inc.* v. *Alfonzo-Larrian*, 490 U.S. 826 (1989) ("The complete diversity requirement is based on the diversity statute, not Article III of the Constitution."); *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978) ("It is settled that complete diversity is not a constitutional requirement."); *Snyder* v. *Harris*, 394 U.S. 332, 340 (1969) (in a class action brought under Fed. R. Civ. P. 23, only the citizenship of the named representatives of the class is considered, without regard to wbether the citizenship of other members of the putative class would destroy complete diversity).

would preserve exclusively to state court jurisdiction what are primarily local controversies.

The amendments also would facilitate the removal to federal court of any purported class action that falls within the additional grant of federal diversity jurisdiction over class actions described above. The bill would not change the existing diversity jurisdiction removal procedures applicable to purported class actions, save for three exceptions intended to correct some of the tactics used by counsel to avoid federal jurisdiction over interstate class actions.[26] In addition, the bill would authorize *unnamed class members* (not just defendants) to remove cases. This even-handed change would allow class members to move cases to federal court (within a reasonable time after notice is given) if they are concerned that the state court has not or will not adequately protect the absent class members' interests.

To avoid leaving before federal courts controversies not warranting the attention of the federal judiciary, the legislation would require a federal court to dismiss any case (that is in federal court solely due to the expanded diversity jurisdiction provisions) that it has determined may not be afforded class treatment. However, the bill specifies that an amended action may be refiled in state court. Further, the bill also protects the interests of the unnamed class members by specifying that federal tolling law will apply to the limitations periods on the claims asserted in the failed class action.

III. Conclusion.

Thank you again for the opportunity to comment on H.R. 1875. I respectfully urge the Subcommittee to recommend the bill favorably to the full Judiciary Committee.

Mr. PEASE. Thank you, Mr. Beisner.

The next three witnesses will address H.R. 2005, and we will begin with Mr. Mack.

STATEMENT OF JAMES H. MACK, VICE PRESIDENT FOR GOVERNMENT RELATIONS, AMT—THE ASSOCIATION FOR MANUFACTURING TECHNOLOGY

Mr. MACK. Thank you, Mr. Chairman. Our written testimony documents the importance of our industry to America's military and economic security. It also documents that the abundance of overage machine tools in workplaces across America is a real litigation nightmare for our members.

Consider that over 60 percent of the machine tools used in U.S. metalworking factories are over 10 years old. When a factory does decide to invest in new capital equipment, the old machinery is not thrown into the trash heap. Instead, companies who lack the resources for new machines, purchase these older machines, often altering them to fit their needs. This process is repeated again and again as newer machines are acquired and older ones are resold.

Even the Defense Department has gotten into the act. Here is a list of all of the overage machines that the Defense Department is offering to sell this month. They have resold over 13,000 overage

[26] *First*, the legislation would amend 28 U.S.C. § 1441(b) to confirm defendants' ability to remove all purported class actions qualifying for federal jurisdiction under the revised section 1332 (as discussed above) regardless of the state in which the action was originally brought.

Second, 28 U.S.C. § 1446(b) would be amended to provide that a defendant could remove a putative class action at any time (even at a date more than one year after commencement of the action), so long as the action is removed within 30 days after the date on which the defendants may first ascertain (through a pleading, amended pleading, motion order or other paper) that the action satisfies the jurisdictional requirements for class actions (as set forth in the proposed section 1332(b)). This provision is intended to prevent parties from filing cases as individual actions and then recasting them as purported class actions (or as broader class actions) after the one-year deadline for removal has passed.

Third, S. 353 would amend 28 U.S.C. § 1446(a) to allow any class action defendant to remove an action. At present, an action typically may be removed only if *all* defendants concur. This provision is intended to address situations in which local defendants with little at risk or defendants "friendly" to the named plaintiffs may preclude other defendants with substantial exposure from gaining access to federal court.

machine tools since 1994, in response to base closures. I am not criticizing that, but I am pointing out that these machines, like the others I have described, are now being used in job shops across America. Many of them are of World War II or Korean War vintage.

The result of all of these factors is a huge, huge overhang of overage machine tools in the U.S. market. This exposes our members and other manufacturers of overage equipment to costly litigation over equipment that has long since passed from their control, or even knowledge of where it is located.

Under product liability law today, in most States potential liability for my industry's products is endless, literally "forever." Many of these machines, built before Ronald Reagan became President, before the creation of OSHA, before Neil Armstrong walked on the moon, before the Beatles came to America, and, yes, even before I was born, are still in use today.

Most of the cases involving overage machines never go to trial and, if they do, a jury almost always finds for our members. If a machine has functioned properly for 18 years, it is highly unlikely that it was improperly designed. The annual product liability survey of our members that I refer to in our testimony reveals that over 75 percent of our claims involve employer fault—misuse of the machine.

The litigation costs are nevertheless extraordinarily oppressive for our members. Insurers pay out 70 cents in defense costs for every dollar that claimants receive.

As Mr. Chabot has eloquently described, enactment of a statute of repose for workplace durable goods would level the playing field for U.S. manufacturers and achieve the uniformity and certainty necessary to produce the state-of-the-art products, for which we are noted.

H.R. 2005 addresses the concerns the President expressed in his veto of the 1996 Product Liability Bill—it provides for two-way preemption, it is limited to workplace products, it assures that no plaintiff would go uncompensated, and it contains a toxic harm exclusion. It does absolutely nothing about removing cases from State to Federal courts nor increasing the caseload of Federal courts.

H.R. 2005 does not represent the first step in the negotiating process with the Senate and the White House. The negotiating process, Mr. Chairman, has been going on for many years, and you, I would suggest, are now involved in the endgame.

H.R. 2005 is identical in scope and coverage to the statute of repose contained in last year's bill, which was heavily negotiated with and approved by the White House, today's comments from the Justice Department notwithstanding.

If this bill is broadened in an attempt to help manufacturers of non-workplace durable goods or is changed in any other way that is known to be unacceptable to the Senate and the White House, then no company will ultimately be better off because the bill will not become the law of the land.

By enacting H.R. 2005, you would be declaring that endless litigation involving overage workplace equipment in the United States marketplace is a serious problem facing American producers of cap-

ital equipment who are, after all, the foundation of our industrial economy.

This is good legislation, and we respectfully urge its early adoption. Thank you.

[The prepared statement of Mr. Mack follows:]

PREPARED STATEMENT OF JAMES H. MACK, VICE PRESIDENT FOR GOVERNMENT RELATIONS, AMT—THE ASSOCIATION FOR MANUFACTURING TECHNOLOGY

I. INTRODUCTION

My name is James H. Mack, Vice President of Government Relations at AMT—The Association For Manufacturing Technology—a trade association whose membership represents over 370 machine tool building firms with locations throughout the United States. About 30% of our industry's output is exported. Pursuant to House Rule XI, clause 2(g)(4), I am obliged to report to you that AMT has received $219,000 in fiscal years 1997–1999 from the Commerce Department's Market Cooperator Development Program to help pay for our export offices in China and the Mercosur countries.

The majority of AMT's members are small businesses. According to the U.S. Census of Manufacturers, 73% of the companies in our industry have less than 50 employees. They build and provide to a wide range of industries the tools of manufacturing technology including cutting, grinding, forming and assembly machines, as well as inspection and measuring machines, and automated manufacturing systems.

Everything in this hearing room, except for the people, was either made by a machine tool or made by a machine made by a machine tool. Several years ago, the Reagan and Bush Administrations, responding to the strong encouragement of over 250 Members of Congress (most particularly including your strong leadership, Mr. Chairman) provided temporary import relief for our industry, based on the threat posed to our national security from Asian machine tool imports. They did so because of their—and your—recognition that a strong machine tool industry is vital to America's military and economic security.

Our industry is very cyclical. Price pressures are very strong, and profitability is relatively low—even in good years. Today, despite the extraordinary performance of our overall economy, domestic consumption of machine tools is 45% lower than a year ago. Imports represent about half of domestic consumption.

According to American Machinist magazine, in 1996 (the last year for which data is available), over 60% of machine tools used in U.S. metalworking industries were over 10 years old. When a factory does decide to invest in new capital equipment, the old machinery is not thrown in the trash heap. Instead, companies, who lack the resources for new machines, purchase these overage machines, often altering them to fit their needs. This process is repeated, as newer machines are acquired and older ones resold.

In addition, as a result of base closures over the past few years, the Defense Department has resold over 13,000 overage machine tools since 1994. They are now being used in job shops across America. Most of the machines are of World War II or Korean War vintage.

The result of all of these factors is a huge overhang of overage machine tools in the U.S. market. This exposes the manufacturers of the old equipment to the threat and reality of costly product liability litigation.

II. THE NEED FOR A FEDERAL STATUTE-OF-REPOSE FOR WORKPLACE DURABLE GOODS

Under product liability law today, in most states, potential liability for my industry's products is endless—literally "forever." Many of these machines—built before Ronald Reagan became President, before the creation of OSHA, before Neil Armstrong walked on the moon, before the Beatles came to America, and yes, Mr. Chairman, even before you or I were born—are still in use today.

Although these machines were built decades ago to safety standards of their day and although they are likely to have passed through several owners—each of whom are likely to have made their own modifications to accommodate their needs—they are still the subject of almost half of our industry's lawsuits.

Most cases involving overage machines never go to trial, and if they do, a jury almost always finds for the defendant. If a machine has functioned properly for 18 years, it is highly unlikely that the machine was improperly designed. However, even when these lawsuits are "won," the litigation nevertheless results in unnecessarily high legal and transaction costs. Insurers know this and factor it into insurance premiums. This also results in legal extortion, in which baseless suits are filed,

knowing that many companies and/or their insurers will pay an out-of-court settlement rather than accept the risk and high cost of defense.

When a case does go to trial and the jury finds for the claimant, the judgement can force a company to close its doors. The $7.5 million verdict in 1996 involving a machine built in 1948 against Mattison Technologies, a 100-year old Rockford, Illinois machine tool builder, led to the company's bankruptcy.

In contrast, the incursion by foreign machine tool builders into the U.S. market is fairly recent (within the past 20 years). Therefore, foreign machine tool builders do not bear the significant long-tail exposure of U.S. builders. American companies that have been in business for many years must factor into their prices the risk of litigation involving thousands of overage machines. Our Japanese and European competitors don't have those risks and those costs. Their liability exposure is relatively small (both Europe and Japan have 10-year statutes-of-repose). Enactment of a statute-of-repose for workplace durable goods would therefore level the playing field for U.S. manufacturers and achieve the uniformity and certainty necessary to produce the state-of-the-art products for which we are noted.

III. H.R. 2005

I appreciate the opportunity to testify in support of "The Workplace Goods Job Growth and Competitiveness Act of 1999" (H.R. 2005). This is not the first time AMT has appeared before this Committee in support of product liability reform. Over the years, we have testified before this and other Congressional Committees in support of numerous product liability bills. Because those bills were broader in scope than H.R. 2005, some of their provisions drew controversy that could not be overcome during their consideration by the Senate and/or the White House.

H.R. 2005 is different. H.R. 2005 deals *only* with the issue of overage workplace products. It does *not* contain controversial provisions on other product liability issues that have held up passage in past years. The bill is identical to the statute-of-repose provisions contained in product liability legislation agreed upon for consideration in the last Congress, after extensive negotiations between the White House and a bipartisan group of Congressional leaders.

Under this proposal, no injured worker would go uncompensated. H.R. 2005 would only deal with claims involving injuries allegedly caused by workplace durable goods for which the claimant has received or is eligible to receive workers' compensation. For that specific category of cases, the provision would create a uniform, national statute-of-repose, preempting any state statutes-of-repose that apply to those claims. Otherwise, state law would continue to apply. Thus, state statutes-of-repose that may cover consumer goods and other non-durable goods would *not* be affected.

The period within which claimants could bring a lawsuit would be extended to 18 years in the 13 states that have enacted time limits (all of them shorter than 18 years); but our members are willing to accept that extension in order to achieve the certainty a national period of repose would provide.

An additional eight states have enacted statutes-of-repose based on the "useful safe life" of the product. This approach has proven to be ineffective; because the "useful safe life" of each product must be litigated in every case, and substantial transaction costs must still be incurred.

IV. AMT'S 24TH ANNUAL PRODUCT LIABLITY SURVEY

Final results of AMT's 24th Annual Product Liability Survey (based on 126 returns) indicate that our members and/or their insurers could reduce their product liability costs by 20%, through adoption of an 18-year federal product liability statute-of-repose.

Thirty-three percent of the respondents reported claims in 1998. Seventy-five percent of the claims were brought in state courts and 25% in federal courts.

Of 121 closed claims reported from 1998, only five percent actually reached trial, and, of these, our members won 83%. One percent of the claims were won by claimants for an average of $215,000; 60% were settled for an average of $104,700 (125% higher than 1997); four percent were won by our members; and the remaining 35% were dropped without awards being paid. In addition, 360 claims were pending at year's end—an average of 8.8 claims per company experiencing litigation.

Whether cases are won, lost, or settled—defense costs for our members are substantial. The 1992 Insurance Services Office (ISO) closed claims study shows that for every $10 paid out to claimants by insurance companies for product liability, another $7 is paid for lawyers and other defense costs. *These transaction costs will be reduced substantially, if Congress enacts H.R. 2005.*

Based upon our survey results, every 100 claims filed against machine tool builders "cost" $11.0 million—including $4.5 million in defense costs and $2.4 million in

subrogation paid to employers and/or their workers' compensation carriers, regardless of employer fault or the lack thereof. In other words, the current system provides $4.1 million to claimants (less whatever they pay out in contingency fees, which average 33%) and $6.9 million in transaction costs.

If an 18-year statute-of-repose were to be enacted, the "cost" of the same 100 claims filed against machine tool builders would be $8.8 million—a savings of $2.2 million or 20%. $3.9 million would still go to claimants, but transaction costs would be reduced by $2.0 million.

Forty-two percent of our members' closed and pending claims (and the substantial transaction costs associated with them) would have been eliminated by an 18-year statute-of-repose.

V. CONCLUSION

Mr. Chairman, H.R. 2005 is a narrow bill that addresses the problem of overage workplace equipment in the U.S. market for manufacturers of that equipment. It does not affect claims involving other products. It establishes no precedent on whether states should enact statutes-of-repose governing other products nor on the appropriate scope or length of those statutes.

H.R. 2005 is the end result of years of negotiations within the Congress and between Congress and the White House. It addresses the concerns the President expressed in his veto of the 1996 product liability bill: it provides for two-way preemption; it is limited to workplace products; it assures no plaintiff would go uncompensated; and it contains a toxic harm exclusion.

H.R. 2005 does *not* represent the first step in the negotiating process with the Senate and the White House. The negotiating process has been going on for many years, and you are now involved in the endgame. If this bill is broadened in an attempt to help manufacturers of non-workplace durable goods or is changed in any other way that is known to be unacceptable to the Senate and the White House, *no* company will ultimately be better off because the bill will *not* become the law of the land. The concerns of other manufacturers can be addressed in separate legislation—now or in the future.

By enacting H.R. 2005, as it is written, you would be declaring that endless litigation involving overage workplace equipment in the U.S. marketplace is a serious problem facing American producers who are, after all, the foundation of our industrial economy; and that the interstate commerce clause impels a federal solution. It is a problem not faced by our Asian and European competitors in their own markets nor, because of the longtail of exposure, in ours.

The current system has cost jobs, money, and time. The principal beneficiaries have been lawyers on both sides of the counsel table. Advances in high-tech products are slowed as a result. Resources that could have gone toward the development of new technology and higher productivity for America have been expended on wasteful transaction costs with a relatively small percentage of total litigation dollars going to injured workers.

Enactment of H.R. 2005 will improve the competitiveness of U.S. workplace equipment manufacturers by driving down their litigation costs and cutting down on meritless lawsuits. At the same time, it ensures that no injured worker would go uncompensated. Passage of similar legislation relating to private aircraft has revitalized the domestic aircraft industry.

This is good legislation, and we respectfully urge its early adoption.

Thank you for your attention. I would be pleased to respond to your questions.

Mr. PEASE. Thank you, Mr. Mack.

Mr. Bantle.

STATEMENT OF THOMAS L. BANTLE, LEGISLATIVE COUNSEL, PUBLIC CITIZEN'S CONGRESS WATCH

Mr. BANTLE. Mr. Chairman and members of the committee, thank you for the opportunity to appear today in opposition to H.R. 2005. This bill would shift the burden of defective products from the manufacturers who design, built and profited from them, to the worker who was injured by them. It would return us to the 1800's by reversing a century of State tort jurisprudence that holds manufacturers responsible for the injury their products cause because

they have a greater ability than the injured person to know if a product is safe, and to design and build it so that it is safe.

The bill does not just make it harder for workers who are injured to recover, it flatly bars them from the courtroom. For instance, a construction worker injured by a defective crane that was just 1 day older than 18 years would have no legal recourse whatsoever against the machinery manufacturer, even if the manufacturer knew the crane was still in wide use, knew the crane was subject to malfunction and had a way to fix the defect, but had failed to warn the users or take any steps to remedy the problem. What could possibly be the justification for stripping maimed workers of their access to court?

The Association for Manufacturing Technologies' own 1998 product liability survey shows there is no liability crisis threatening its members. The survey indicates that only six product liability cases were tried by their members in 1998, and the plaintiff won in only one case, receiving an award of $215,000, a substantial but not overwhelming sum.

The survey noted that the average liability insurance premium for its machine tool firms was down 31 percent from 1997, continuing the downward trend that began in 1987. These numbers do not justify Federal intervention.

The bill's proponents claim the bill won't hurt workers because it applies to workers who receive workers' compensation. But as Chairman Hyde pointed out in a hearing last month, workers' compensation is a tradeoff, a smaller payment in return for not having to prove fault.

Workers' compensation does not make injured workers whole. A 1998 study of California's workers' compensation system by the RAND Institute for Civil Justice found workers' compensation benefits "cushion workers from reduced wages and time away from work only for a short period after the injury. Because wage losses persist and because benefit payments run out, benefits compensate slightly less than 40 percent of the workers' full losses over a 5-year period after the accident." To claim that cutting off recoveries other than workers' compensation doesn't hurt workers is simply false.

Who will be hurt by this bill? Unfortunately, there are many examples, but let me just give you one. Frankie Martin, a Vietnam War Veteran employed in a laundry, was injured on the job by a 33-year-old defective ironing machine. Mr. Martin lost all four fingers of his left hand after it became caught in the machine's chain and sprocket system. He sued the manufacturer of the machine for defective design and failure to warn of the defect. The matter was settled for $250,000, significantly more than he would have received under workers' compensation. If this bill had been law, Mr. Martin and his family would have been barred from going to court to seek that just compensation.

The fundamental unfairness of the bill is demonstrated by the fact that in almost half the States that have enacted statutes of repose, the States' highest courts have overturned them or modified them, finding their arbitrary cutoff dates are inconsistent with the States' due process or equal protection clauses, or the constitutional requirement that the courts be open to allow injured people

to seek redress. Another 27 States have chosen not to shut the courthouse door to injured workers, by repealing or never adopting statutes of repose.

Mr. Chairman, the facts show there is no crisis in liability cases that would justify this unfair and harsh proposal. The real agenda of this bill is to establish another beachhead in the effort to federalize tort law. Like previous Federal products liability bills, H.R. 2005 would represent a major interference with the traditional authority of State legislatures and State court judges and juries in civil cases.

Tort remedies should lie with State courts and legislatures which are most aware of and best suited to determine the social and economic impact of law on their own communities. But proponents of so-called "tort reform" legislation find State tort law inconvenient. They seek to boost their profits by attacking the mechanisms consumers and workers use to ensure safe products and safe workplaces.

The same coalition that supports this bill has worked over the past decade to whittle away the ability of injured persons to be fairly compensated. Failing in their sweeping attacks, their new approach is to nibble away, federalizing tort law industry-by-industry. Now they seek to abolish or limit consumers' and workers' rights remedy-by-remedy.

To sum up, there is no crisis, and thus no basis for fundamentally altering the American Federal system, by intruding into matters traditionally governed by State legislatures and State courts. There is no justification for leaving workers and their families without any legal redress for their injuries. I urge the committee to reject this unfair and unwise legislation.

[The prepared statement of Mr. Bantle follows:]

PREPARED STATEMENT OF THOMAS L. BANTLE, LEGISLATIVE COUNSEL, PUBLIC CITIZEN'S CONGRESS WATCH

Chairman Hyde, Ranking Member Conyers, and members of the Committee: Thank you for the opportunity to appear today in opposition to H.R. 2005, to Establish a Statute of Repose for Durable Goods Used in a Trade or Business.

Because of the bill's extraordinary elimination of workers' access to the courts to seek compensation for injuries cause by defective products, I will concentrate on that provision of the bill. Equally unsettling is the bill's radical interference with the traditional authority, under our federal system, of state legislatures and state court judges and juries in civil cases.

H.R. 2005 would preempt state law to create a new federal law of products liability that would discriminate against working people injured or killed on the job by defective older products by arbitrarily cutting off the responsibility of a manufacturer for its defective products when the product is 18 years old.

The bill provides that no civil action for damage to property arising out of an accident involving a durable good may be filed against the manufacturer or seller of the product more than 18 years after the durable good was delivered to its first purchaser or lessee. No civil action for damages for death or personal injury arising out of an accident involving a durable good may be filed against the manufacturer or seller of the durable good more than 18 years after the durable good was delivered to its first purchaser or lessee if the injured person is eligible to receive workers' compensation, and the injury does not involve a toxic harm.

There are a few exceptions. The bill does not provide a statute of repose for passenger vehicles, boats, aircraft, and trains used primarily to transport passengers for hire. If a defendant made an express warranty in writing that the safety or life expectancy of a specific product was longer than 18 years, the bill does not apply until the expiration of that warranty. And the bill does not affect the shorter statute of repose established by the General Aviation Revitalization Act of 1994 (49 U.S.C. 40101 note).

SHIFTING THE COSTS OF DEFECTIVE PRODUCTS TO WORKERS AND THEIR FAMILIES

Mr. Chairman, this bill would shift the burden of defective products from the manufacturers who designed, built, and profited from them to the worker who is injured by them. The bill would return us to 19th Century doctrine that employees should not recover for work place injuries because they assume the risks inherent in the workplace when they take their jobs. The bill would reverse a century of state tort jurisprudence that fashioned doctrines holding manufacturers responsible for the injury their products cause because they have a greater ability than the injured person to know if a product is safe, to design and build it so that it is safe, and to insure against losses caused by a product.

This bill proposes to unfairly shift the risk of defective products to workers. It does not propose that the products be required to have a warning prominently stamped on them saying "Do not use this product after July 21, 2017, because it will be 18 years old and the manufacturers will no long be responsible for its design or manufacture." No, it simply takes remedies away from workers who use defective products if the durable good is more than 18 years old, whether the worker knows the age of the product or not.

For instance, under the bill, a construction worker injured by a defective crane that was just one day older than 18 years would have no legal recourse whatsoever against the machinery manufacturer—even if the manufacturer knew the crane was still in wide use, knew that the crane was subject to malfunction, and had a way to fix the defect, but *still* failed to warn the users or take any steps to remedy the problem.

What could possibly be the justification for stripping workers of their ability to be fully compensated for injuries?

On its website, the Association for Manufacturing Technology, one of the bills' proponents claims the bill will:

- Promote American Competitiveness.
- Reduce Transaction Costs Without Hurting Workers.
- Promote Fairness.

I will rebut each of these assertions.

H.R. 2005 WILL NOT PROMOTE AMERICAN COMPETITIVENESS

Although competitiveness is a popular catchword, this bill will not affect American competitiveness. Global manufacturers and domestic manufacturers are all subject to the same state tort laws when their defective products injure workers in the United States. Similarly, domestic companies have the benefit of the liability limitations in foreign countries. In an open world marketplace, this bill does not affect global competitiveness.

Indeed, the Association for Manufacturing Technology's own 1998 Product Liability Survey confirms that there is no liability crisis threatening American manufacturers. The survey of their members indicates that only six products liability cases were tried in 1998 and the plaintiff won in only one case, receiving an award of $215,000, a substantial, but not overwhelming sum. Sixty percent of the claims were settled and 35 percent were dropped without any payment. The survey noted that the average liability insurance premium for its machine tool building firms was down 31 percent from 1997, continuing the downward trend that began in 1987. This bill is a drastic "solution" to a nonexistent problem.

WORKERS WILL BE HURT: WORKERS' COMPENSATION ALONE IS AN INADEQUATE REMEDY

The bill's proponents say, in effect, "Don't worry. The bill only applies to workers who will receive workers compensation." The implication that injured workers won't be financially hurt only shows that the bill's proponents haven't had to support a family on workers' compensation benefits.

As Chairman Hyde pointed out in a hearing last month, workers' compensation is a tradeoff—a small payment, but without a requirement to prove fault.

Workers' compensation laws allow for only partial recovery from employers—usually only medical costs and limited disability payments to cover lost wages. Although each state law is different, many states provide workers with only a few years of disability payments for a permanent, lifetime injury. They do not provide compensation for non-economic damages such as loss of fertility, loss of a limb, permanent disfigurement and other non-monetary losses.

Every reputable study continues to show that workers' compensation does not make injured workers whole. For example, a 1998 study of California's workers' compensation systems by the RAND Institute for Civil Justice concluded "that work-

ers who suffer workplace injuries resulting in a permanent disability experience large and sustained wage losses." Workers' compensation benefits

> cushion workers from reduced wages and time away from work only for a short period after the injury. Because wage losses persist and because benefit payments run out, benefits compensate slightly less than 40 percent of workers' full losses over a five-year period after the accident (RAND Research Brief summarizing research published as *Compensating Permanent Workplace Injuries: A Study of the California System*, by Mark A. Peterson, Robert T. Reville, and Rachel Kaganoff Stern, with Peter S. Barth, RAND, 1998).

To claim that cutting off recoveries other than workers' compensation doesn't hurt workers is simply false.

Who will be hurt by this bill? Injured workers whose cases would be barred under the proposed bill. For example:

- Frankie Martin, a Vietnam War Veteran and employee of the State of New York at the Central Islip Psychiatric Laundry facility, was injured on the job by a 33-year-old defective ironing machine. Mr. Martin lost all four fingers of his left hand after it became caught in the machine's chain and sprocket system. Though Mr. Martin received a small workers' compensation award, he subsequently sued the manufacturer of the machine for defective design and failure to warn of the defect. The matter was settled for $250,000, significantly more than his workers' compensation award. (Martin v. American Laundry Machinery Inc., Supreme Court, Suffolk County, NY, Index # 92–7429.)
- Joseph Curiel was severely injured by a 34-year-old defective tin-finishing machine at United State Steel's facility in Pittsburgh, PA. Mr. Curiel's leg was caught and trapped in the machine for 45 minutes and he suffered multiple fractures to his leg. He had to undergo eleven separate surgeries before trial and will need an ankle fusion and knee replacement in the future. Mr. Curiel was awarded $2.1 million in his suit against the manufacturer. (Curiel v. Wean United, Inc and Clark Controller Company, Contra Costa County, CA, No. 27842.)
- George Navarro, a 60-year-old steelworker from Pittsburgh, was injured at a U.S. Steel plant by a defective tin-making machine which was more than 20 years old. Mr. Navarro's hands were crushed when they were caught between two rollers of the machine as he tried to remedy a problem of solution splashing from the machine. He was left with no use of his left hand and only limited use of his right. His case against the manufacturer was settled, before trial, for $800,000. (Navarro v. Pannier Corporation, Wean United, Inc. and Westinghouse Corporation, Contra Costa County Superior Court, No. C 88–04037.)
- Kanya Shimizu, a 22-year old student and agricultural trainee, was severely injured while using a defective corn roller mill, more than 20 years old, at his employer's feed lot. Mr. Shimizu's hand was pulled into the corn roller and doctors were forced to amputate. His case against the manufacturer of the machine settled before trial for $875,000. (Shimizu v. Bluffton Agri-Industrial Corporation, et al., Santa Clara County, CA, No. 706885.)

These are just a few examples. There are thousands of workplace injuries caused each year in this country by defective products, many of them over 18 years old.

This bill is not only unfair to injured workers and their families, but it forces the workers' compensation system to subsidize the costs that should be charged to the manufacturers of older defective equipment. Under state workers' compensation laws, if a third party is found responsible for causing an injury, the cost of any workers' compensation or employer-paid health benefits paid to the injured party are reimbursed out of the settlement with or judgment against that third party. This reimbursement policy ensures that employers and workers' compensation systems do not subsidize manufacturers of defective products.

By shifting the cost of injury to workers and employers, this bill removes the legal and financial incentive that the manufacturers of durable workplace machinery currently have to ensure that their products remain safe throughout their useful lives.

THE STATUTES OF REPOSE BILL UNFAIRLY SINGLES OUT WORKERS AND TAKES AWAY FUNDAMENTAL RIGHTS

H.R. 2005 unfairly discriminates against workers. If a bystander were injured by the same defective older product that a worker, the bystander could still sue the manufacturer and receive full compensation, since their injuries would not be cov-

ered by workers' compensation and hence not barred by this federal statute of repose. For example, if a 24-year-old elevator malfunctions and crashes, killing the building's custodian and a visitor to the building, the visitor's survivors could bring a civil action against the manufacturer of the elevator. The family of the custodian, killed while on the job, could not receive anything in addition to survivors' benefits under workers' compensation—even if they would otherwise be able to bring a suit under their state's wrongful death statute.

Moreover, while the bill would eliminate employer suits for property damages, employers would still be able to sue a manufacturer of a defective product covered by the statute of repose to recover commercial losses, such as loss of sales, caused by the defective product, if allowed by state law. It is only workers who are totally shut out by the bill.

An even more fundamental fairness issue is demonstrated by the fact that in almost half the states that enacted statutes of repose in products liability actions (including Alabama, Arizona, Kentucky, New Hampshire, North Dakota, Rhode Island, South Dakota, and Utah), the highest state courts have overturned state-imposed statutes of repose as violative of their state constitutions. At least ten states have found that these arbitrary cut-off dates for manufacturers' liability for defective products are inconsistent with the state's dues process or equal protection clauses, or the state's constitutional requirement that the courts be open to injured people to seek redress.

In Alabama, that court held that the state's ten year statute of repose was arbitrary and violated the "fundamental principle of fairness" that limited "the power of the government to infringe upon individual rights." *Lankford* v. *Sullivan, Long and Hagerty, 416 So.2d 996 (Ala. 1982).* The Supreme Court of New Hampshire stated that the right to recover for personal injury is "an important substantive right" and that the state's twelve year statute of repose was inherently unreasonable because it "eliminates a plaintiff's cause of action before the wrong may reasonably be discovered" and unfair because it discriminated between classes of injured plaintiffs, barring the claims of those injured by defective products but not those harmed by other tortious conduct. *Heath* v. *Sears, Roebuck & Co. 464 A.2d 288 (N.H. 1983).*

The "harshness" of an absolute "date-of-use" statute of repose was noted by the North Dakota Supreme Court, which overturned that state's twelve year limitation because of its constitutional concern "about statutes which arbitrarily deny one class of persons important substantive rights to life and safety which are available to other persons." *Hanson v. Williams County, 389 N.W. 2d 319 (N.D. 1986).*

Another 27 states have chosen not to shut the courthouse door to those injured by defective products by never adopting or repealing statutes of repose. These states include the home states of many members of the Judiciary Committee including: Arkansas, California, Indiana, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, South Carolina, Virginia, Wisconsin. This bill would overturn the determinations of all these state legislatures and courts without any demonstration of the need for federal intervention.

ASBESTOS CLAIMS MAY BE PREEMPTED BY THE BILL

In addition to the deliberate elimination of workers' rights contemplated by the bills' proponents, the bill may also inadvertently wipe out the legal rights of workers harmed by asbestos. Asbestos was a part of many durable goods. The personal injury section of the bill contains an exception for injuries caused by "toxic harm," but toxic harm is not defined, leaving substantial uncertainty to whether courts will consider asbestos a toxin that causes "toxic harm." Without a definition, its meaning will be determined on a case by case basis and there is considerable uncertainty whether asbestos would be treated, as a matter of law, as a toxic substance. As stated in a 1964 Journal of the American Medical Association article, "Asbestos is not currently considered a toxic substance since it does not produce systemic poisoning." Instead, it is a naturally-occurring mineral which causes a slowly progressive fibrotic reaction in the lungs that can induce cancer, often 30 to 40 years after inhalation. Thus, this loosely-drafted exception may not provide any protection to workers with asbestosis and related diseases. Because many asbestos exposures occurred over 18 years ago, and H.R. 2005 would apply to injuries that occurred before the date of enactment of the bill, this legislation could effectively wipe out virtually all asbestos exposure cases.

CONCLUSION: THE REAL AGENDA OF THIS BILL IS TO FEDERALIZE TORT LAW, MAKING IT EASIER TO DIMINISH CORPORATE RESPONSIBILITY

Like all federal products liability bills introduced over the past 16 years, H.R. 2005 would represent a major interference with the traditional authority of state legislatures and state court judges and juries in civil cases. Tort law has been the province of the states since this country began. Such preemption of the proper role the states has been strongly opposed by the Conference of Chief Justices in past testimony. It was stated best by the Honorable Stanley Feldman, Chief Justice of the Supreme Court of Arizona, who has told Congress that "tort remedies must lie with State courts and legislatures, which are most aware of and best suited to determine the social and economic impact of present law on their own communities." The genius of American state tort law has been its ability to evolve to meet changing risks and changing societal norms about acceptable corporate and personal behavior.

In this evolution, some state legislatures have decided that they wish to cut off manufacturers' liability for older products after a certain date. But most others have not.

But proponents of all so-called "tort reform" legislation find state tort law inconsistent, uncertain, and unpredictable. They seek ways to limit their liability. In a continuing attack on consumers' rights to safe products, the same coalition that supports this bill has worked over the past decade to whittle away the ability of injured persons to be fairly compensated. Failing in their sweeping attacks on state courts earlier this decade, their new approach is to nibble away at consumer protections, federalizing remedies industry by industry, starting with general aviation in 1994, biomaterials last year, and Y2K defects this year. Now they seek to abolish or limit consumers' rights, remedy by remedy (witness today's hearings on class actions and this statute of repose bill).

In sum, there is no crisis and thus no basis for fundamentally altering the American federal system of jurisprudence by intruding into matters traditionally governed by state legislatures and state courts. There is no justification for this unfair denial of rights, leaving workers and their families without full compensation for their injuries. I urge the Committee to reject this unfair and unwise legislation.

Thank you again for the opportunity to testify on this important matter.

Mr. PEASE. Thank you, Mr. Bantle.

Mr. Bleicher.

STATEMENT OF SAMUEL A. BLEICHER, MILES & STOCKBRIDGE, P.C., ON BEHALF OF THE COALITION FOR UNIFORM PRODUCT LIABILITY LAW

Mr. BLEICHER. Thank you, Mr. Chairman and members of the committee, for this opportunity to appear on behalf of the Committee for Uniform Product Liability Law, to urge your support for enactment of H.R. 2005.

The House has adopted several product liability bills in past years, only to see them fail in the Senate or by Presidential veto. In light of this experience, we believe it is time to try a more modest approach: enactment of a national statute of repose for capital goods used in the workplace.

The public policy basis for a capital goods statute of repose is sound. The litigation that would be barred by H.R. 2005 is unfair, disproportionately expensive, and socially unproductive, for several reasons.

First, it is unfair because it is not rationally directed at the parties most responsible for the claimant's injury. The claimant can only sue the manufacturer of the equipment, because the workers' compensation laws protect the claimant's employers and fellow employees. The fact that manufacturers are often sued does not reflect an underlying reality that their equipment is often the prime cause of injury. Instead it reflects the legal protection accorded the more responsible parties.

Second, old capital equipment has often been significantly altered or inadequately maintained by the owner. Safety features have sometimes been negligently or intentionally disabled by employers or by workers in an effort to increase production or to avoid the nuisance of dealing with guards, lock-out mechanisms, and other safety features.

Third, such ancient machinery often looks poorly designed when measured against modern counterparts, even if it was state-of-the-art at the time it was made.

Fourth, no matter how frivolous the actual facts, the claimant's pleadings must be answered, depositions taken, design experts consulted, and historical records, if any, unearthed and evaluated.

Finally, even when the claimant succeeds, there is rarely any larger social benefit from the litigation, because the design has already long been superseded by newer, usually safer, versions.

Equipment manufacturers win the vast majority of these cases, and most never get to the jury, as Mr. Mack pointed out, and Mr. Bantle conceded. Many cases are settled just to avoid the costs of defense, but at amounts that are nevertheless significant, in the aggregate, to manufacturers. The primary impact of this litigation is a drain on financial resources, not from the adverse verdicts, but from the costs of successful defense. In other words, most of the money goes to the lawyers on both sides.

The second issue is the role of State legislatures. State legislatures cannot solve this problem. Twenty-one State legislatures have adopted statutes of repose, of which 13 have effective time limits. But some State courts (ten, according to Mr. Bantle) have struck down legislated statutes of repose on various State constitutional theories, creating a situation in which even State legislatures cannot bar such litigation. And, in fact, one State supreme court has refused to apply the standard choice of law principle that the law of the place of the injury applies, on the ground that applying the foreign statute of repose would raise a difficult State constitutional law question. So even if all State legislatures agreed on the desirability of a capital goods statute of repose, they could not control the outcome, even with respect to injuries in their own States, because plaintiffs would shop for forums where the case will not be barred and where law of the forum will be applied rather than law of the place of the injury.

As mentioned, this statute is a narrow, targeted bill. It does not affect claimants who are not eligible for workers' compensation for the injury they have suffered, it doesn't cover consumer goods, it doesn't cover parties injured by a toxic harm.

The bill includes a saving clause allowing new suits to be filed within 1 year after its effective date, to avoid unfair surprise, and it leaves pending cases untouched.

This bill does have two-way preemption in it, unlike some earlier product liability bills. That means that the statute of repose will actually be extended in those 13 States that currently have fixed-time statutes, which are, in fact, shorter than this time.

Finally, this bill has an exemption for toxic harm, which I mentioned. There was some question raised in some testimony about whether that dealt with asbestos cases. The whole point of this provision, which has been in several previous bills and as it is in this

one, is to deal with latent injuries, and the legislative history of this provision is quite clear that it is intended to exempt cases involving such latent injuries as asbestos claims. So, there is no real doubt about that in the scope of the legislation.

Let me stress, in concluding, that this is a consensus bill, and CUPLL believes that it is a modest, but important, step that should be approved on its own merits, not as a precedent for anything more or for anything less, and we hope that the committee and the Congress will enact it. Thank you.

[The prepared statement of Mr. Bleicher follows:]

PREPARED STATEMENT OF SAMUEL A. BLEICHER, MILES & STOCKBRIDGE, P.C., ON BEHALF OF THE COALITION FOR UNIFORM PRODUCT LIABILITY LAW

SUMMARY

The House has adopted several product liability bills, only to see them fail in the Senate or by Presidential veto. In light of this experience, we believe it is time to try a more modest approach to one of the most important issues affecting CUPLL members—enactment of a national statute of repose for capital goods used in the workplace. We are pleased to support H.R 2005, which addresses only this issue. It reflects a broad consensus position that has been endorsed by both houses of Congress. It also meets the objections raised by the White House against repose provisions in earlier legislation.

The Need for a Uniform Capital Goods Statute of Repose

The public policy basis for a capital goods statute of repose is sound. Such litigation threatens to impose liability in situations where the manufacturer has not exercised control over the product for such a long period that it is unfair to hold it accountable for the product's performance. It is also disproportionately expensive and socially unproductive. Current litigation outcomes are unpredictable depending on where the injury occurs and where the manufacturer is located. Some States have statutes of repose; others do not. Some State courts have struck down legislated statutes of repose on various constitutional theories, creating a situation in which even State legislatures cannot bar such litigation.

The litigation that would be barred by HR 2005 is disproportionately costly and unproductive for society as a whole. A number of factors contribute to this result: First, this litigation is not rationally directed at the parties most responsible for the claimant's injury. Second, this litigation is not typically class-action material; on the contrary, it is extremely individual and fact-intensive. Third, such ancient machinery often looks poorly designed when measured against modern counterparts made by the same or competing manufacturers, even if it was state-of-the-art design at the time it was made.

Equipment manufacturers nevertheless win the vast majority of these cases, and most never get to the jury. Many cases are settled for less than the costs of defense, but at amounts that are significant to the claimant and, in the aggregate, to manufacturers.

The Scope of Coverage of H.R. 2005

Perhaps the easiest way to illustrate its scope is to list the areas that are not affected by the bill. It does not affect claimants who are (1) not eligible for workers' compensation for the injury they have suffered; (2) injured by consumer goods, as opposed to durable goods held for the production of income; (3) injured by goods that are less than 18 years old; (4) injured in a manner involving a toxic harm; (5) injured by equipment covered by an express safety warranty of equipment that runs beyond the 18 years; (6) injured by common carrier equipment; (7) injured in a manner covered by the General Aviation Revitalization Act. The bill also includes a saving clause allowing new suits to be filed within one year after its effective date, to avoid unfair surprise, and leaves pending cases untouched.

This bill establishes a nationally uniform statute of repose for capital goods. H.R. 2005 has "two- way preemption," which will actually extend the repose period for capital goods in at least those 13 States that currently have fixed-time statutes of repose.

STATEMENT

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to appear before you today to urge your support for enactment of H.R. 2005, the "Work Place Goods Job Growth and Competitiveness Act of 1999."

My name is Sam Bleicher. I am a Principal in the law firm of Miles & Stockbridge P.C., and I am appearing today for the Coalition for Uniform Product Liability Law, known as CUPLL. CUPLL comprises almost 100 manufacturers, large and small, representing diverse segments of American industry. Since its formation in 1981, CUPLL has been committed to improving the product liability system through Federal legislative reform. A list of CUPLL's members is attached to my testimony. CUPLL's members include large and small businesses who are interested in reforming our Nation's patchwork quilt of product liability legislation. CUPLL has worked with this Committee and the Congress for many years in an effort to eliminate wasteful, unproductive litigation directed against America's manufacturers.

The Committee on the Judiciary has led the way in recent years in efforts to rationalize our product liability laws. The House has adopted several product liability bills, only to see them fail in the Senate or by Presidential veto. In light of this experience, we believe it is time to try a more modest approach to one of the most important issues affecting CUPLL members—enactment of a national statute of repose for capital goods used in the workplace. We are pleased to support H.R 2005, which addresses only this issue. It reflects a broad consensus position that has been endorsed by both houses of Congress. It also meets the objections raised by the White House against repose provisions in earlier legislation.

As you know, HR 2005 is statute of repose for durable goods used in a trade or business. Its purpose is to bar litigation against the manufacturer of capital equipment that is more than 18 years old by a claimant who is eligible for workers compensation. Unlike a statute of limitations, a statute of repose measures the time limitation from the date of the initial sale of the capital equipment. Statutes of limitations, by contrast, typically impose a time limit measured from the time of the injury or the discovery of its cause.

The Need for a Uniform Capital Goods Statute of Repose

Prospective defendants are of course always interested in reducing their exposure to litigation, but that is not by itself enough reason for Congress to act. The public policy basis for a capital goods statute of repose is two-fold:

- first, such litigation threatens to impose liability in situations where the manufacturer has not exercised control over the product for such a long period that it is unfair to hold it accountable for the product's performance;
- second, such litigation is disproportionately expensive and socially unproductive.

Jim Mack has just described the economic burdens imposed by such litigation and our national experience with the General Aviation Revitalization Act of 1994, which demonstrates the substantial benefits that can be expected if Congress lifts this burden. The record of many previous hearings before this Committee and the House and Senate Commerce Committees provides extensive supporting documentation for these conclusions.

I would like to spend a few moments explaining why the litigation that would be barred by HR 2005 is disproportionately costly and unproductive for society as a whole. A number of factors contribute to this result:

- First, this litigation is not rationally directed at the parties most responsible for the claimant's injury. The claimant can only sue the manufacturer of the equipment, because workers' compensation laws protect the claimant's employer and fellow employees. Any vigorous plaintiff's counsel will immediately recognize that a suit against the manufacturer of the equipment, even if relatively "creative," has no downside, is a much better bet than a lottery ticket, and just might pay off equally well. So the fact that manufacturers are often sued does not reflect an underlying reality that their equipment is often the prime cause of the injury; instead it reflects the legal protection accorded the more responsible parties.
- Second, this litigation is not typically class-action material; on the contrary, it is extremely individual and fact-intensive. Capital equipment that is 18 or 38 or 58 years old has often been significantly altered or inadequately maintained by the owner. Safety features built into the original equipment have sometimes been negligently or intentionally disabled by employers or workers in an effort to increase production or avoid the "nuisance" of dealing with guards, lock-out mechanisms, and other safety features. But proving such circumstances is extremely difficult.

- Such ancient machinery often looks poorly designed when measured against modern counterparts made by the same or competing manufacturers, even if it was state-of-the-art design at the time it was made. But defending ancient equipment against assertions of unsafe design is problematic, because design engineers have retired, died, or moved to other businesses; manufacturing records have often been lost; and the feasibility of alternative design approaches cannot be meaningfully evaluated decades later.

Equipment manufacturers win the vast majority of these cases, and most never get to the jury. Many cases are settled for less than the costs of defense, but at amounts that are nevertheless significant to the claimant and, in the aggregate, to manufacturers. Even if the claimant succeeds, there is rarely any larger social benefit, because the design has already long been superseded by newer, usually safer versions. The primary impact of this litigation is a drain on financial resources, not from the adverse verdicts, but from the costs of successful defense. No matter how frivolous the actual facts, the claimant's pleadings must be answered, depositions taken, design experts consulted, and historical records, if any, unearthed and evaluated. The result is substantial expenditure of funds, additional litigation in our courts, and the diversion of resources that could be invested in greater competitiveness.

The Importance of a National Statute of Repose

The need for a Federal statute of repose for capital goods is evident from the nature of the unified market established by the Commerce Clause of the Constitution. Manufacturers sell equipment throughout the country, or find out that their equipment has been resold throughout the country, making them subject to a wide diversity of State statutes of repose (or no statute of repose). Moreover, because claimants often have the opportunity to choose among State forums, even State legislatures cannot effectively establish statutes of repose that protect their own manufacturers or manufacturers headquartered in other States.

The resulting disparity in outcomes is quite dramatic. Depending on the State in which the injury occurs and the State in which the manufacturer is located, a claim against a manufacturer of old capital equipment may be readily pursued or entirely barred. Twenty-one State legislatures have adopted statutes of repose, of which 13 have effective temporal limitations—all periods of 15 years or less.[1] Some State courts have struck down legislated statutes of repose on various constitutional theories, creating a situation in which even State legislatures cannot bar such litigation. At least one State Supreme Court has even refused to apply the standard choice of law principle that the law of the place of the injury applies, on the ground that applying the "foreign" statute of repose would raise a difficult question of validity under its own State constitution. In sum, even if all State legislatures agreed on the desirability of a capital goods statute of repose, they do not have the ability to control the outcome of litigation, even with respect to injuries in their own States.

The Scope of Coverage of H.R. 2005

Turning to H.R. 2005, let me begin by stressing again its precise, targeted provisions. Perhaps the easiest way to illustrate its character is to list the areas that are not affected by the bill. It does not affect claimants who are

- not eligible for workers' compensation for the injury they have suffered.
- injured by consumer goods, as opposed to durable goods held for the production of income.
- injured by goods that are less than 18 years old.
- injured in a manner involving a toxic harm.
- injured by equipment covered by an express safety warranty of equipment that runs beyond the 18 years.
- injured by common carrier equipment.
- injured in a manner covered by the General Aviation Revitalization Act of 1994.

The bill also includes a saving clause allowing new suits to be filed within one year after its effective date, to avoid unfair surprise, and leaves pending cases untouched.

[1] The 13 States with fixed-time statutes of repose are Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Nebraska, North Carolina, North Dakota, Ohio, Oregon, Tennessee, and Texas. Among the States with no statute of repose are California, Massachusetts, New Jersey, New York, and Pennsylvania.

This bill establishes a nationally uniform statute of repose for capital goods. Some earlier product liability bills had "one-way preemption," which would create a Federal statute of repose in those States with no statutes of repose while preserving shorter State repose periods. Unlike those provisions, H.R. 2005 has "two-way preemption," which will actually extend the repose period for capital goods in at least those 13 States that currently have fixed-time statutes of repose.

Finally, the bill is explicit that it does not preempt or supersede State laws that are not specifically covered by this bill. There is no shadow preemption affecting the rights of either claimants or defendants outside of the specific confines of the coverage of H.R. 2005.

Conclusion

In concluding, let me reiterate that this is a consensus bill. It does not make everyone in industry happy, particularly those seeking to solve potential broad mass-exposure liabilities and those parties whose claims arise largely in States with existing shorter statutes of repose. Conversely, it does not satisfy those that believe that all claimants' litigation is good for America. But overall, the benefits to the American economy outweigh the disadvantages, and provisions like this (and broader) have already been approved in past years by both the House of Representatives and the U.S. Senate. Moreover, the White House has previously indicated that legislation along these lines would be acceptable to the President.

CUPLL believes that H.R. 2005 is a modest but important step that should be approved on its own merits, not as a precedent for or against anything more or anything less. After two decades of frustrated efforts to enact product liability legislation containing a statute of repose into law, we hope that this Committee, the Congress, and the President will agree that H.R. 2005 is the right step right now.

Thank you for your time and attention.law offices

Mr. PEASE. Thank you, Mr. Bleicher.

I conclude this session the way we began, by apologizing to all the members of the panel. We have a series of votes on the Floor that we must attend to, but Mr. Goodlatte will reconvene the committee at approximately 2:30, for the purpose of questions from members of the committee. If it is possible for members of the panel to return, we would appreciate it. If you can't, we do understand. Thank you so much.

The committee is in recess.

[Recess]

Mr. GOODLATTE. The committee will reconvene. I will recognize myself for 5 minutes.

Mr. Wolfman, in your testimony you say that H.R. 1875 would overrule the *Strawbridge* v. *Curtis* case, an 1806 U.S. Supreme Court case. And you say that in that case the court interpreted the Federal diversity statute to require complete diversity. When that statute was enacted, did class actions exist?

Mr. WOLFMAN. This was directed to me?

Mr. GOODLATTE. Yes.

Mr. WOLFMAN. I am sorry, I didn't hear the beginning of the question. The answer is that there were no—I believe there was no rule-based class actions, but there were class action precursors that existed in equity.

Mr. GOODLATTE. But not under the Federal Rules.

Mr. WOLFMAN. Oh, there certainly weren't. The Federal Rules weren't established until 1938.

Mr. GOODLATTE. Let me finish my question. Isn't Congress free to change statutes? When we change statutes that have been interpreted by courts, that doesn't mean we are overruling the courts necessarily, it simply means that we are changing the statute.

Mr. WOLFMAN. Oh, I agree entirely. I think in my written testimony, in the next few sentences, I say that the Supreme Court has

made clear in a case in 1967 that Congress is free to establish minimal diversity.

Mr. GOODLATTE. Mr. Beisner, do you want to comment on that?

Mr. BEISNER. I think that his characterization is exactly correct, that Congress is free to change the statute, but I think it is also equally clear that Congress clearly did not have in its contemplation enacting the complete diversity notion class actions in their present form.

Mr. GOODLATTE. Mr. Struve, you state that Federal courts, respecting our system of dual sovereignty, are less likely to construe, extend, or expand State law in any new way. If the class action involves the laws of multiple States—which it would under H.R. 1875 because if it didn't, the class action would stay in the State court—isn't that a good thing? Why should the courts of one State be construing, extending, or expanding the law of another State in a new way?

Mr. STRUVE. Congressman Goodlatte, first of all, in many cases, as you know, the State courts have declined to certify multi-State class actions for that very reason, but in those cases where they have certified a multi-State class, the issue, I think, for you to consider is whether a Federal court in State A is any better qualified to judge the law of State B than a State court in State A, because those are the two alternatives to which the bill applies.

Mr. GOODLATTE. Anyone else care to comment on that? Mr. Beisner?

Mr. BEISNER. Mr. Chairman, I would just note that under the notion of diversity jurisdiction that is a role that I think the Framers intended to give to Federal courts. By saying that disputes between people of different States would be subject to Federal jurisdiction in certain circumstances, that was the role they were assuming Federal courts would do, to referee battles between citizens of different States, which obviously would implicate interpreting State laws.

Mr. GOODLATTE. A question for Judge Dellinger and Judge Bell. Both the Department of Justice, in their previous testimony, and Professor Daynard, suggested that if our bill is passed, some people will not get their day in court. Are they right?

Mr. BELL. No. The Federal courts in the area of the country I practice in, the 5th circuit and the 11th circuit, are not behind. No one would lose their right. You are more apt to lose your right in the State court. Many of the State courts are farther behind. I have heard several comments this morning that we had many vacancies on the Federal court. Most of the vacancies in my part of the country, where the returning judge took a senior judgeship, they are still there serving as judges. We have had very few deaths or disabilities, so the judges are there and you can get a prompt hearing in the Federal courts in our section, and we have many class actions in the Federal court.

Mr. GOODLATTE. Mr. Dellinger?

Mr. DELLINGER. Just to add a thought on that workload point, Representative Goodlatte. It is the responsibility of the President and the Congress, and in particular the Senate, to provide a fully functioning system of the Federal courts, so that it is not, I think, a proper objection to matters that ought to be within the jurisdic-

tion of the Federal courts that affect the national economy, to say that we have some judicial vacancies. The solution there is for the President, and the responsibility is with both the President and the Senate, to get those nominations up, to reach agreement, to get some judges confirmed, and to take care of that particular problem.

It is also the case that—speaking more generally about people being denied their day in court—that it is important to recognize that the Federal system of class actions is a functioning system, and the people can bring class actions there, can bring individual lawsuits in State court, can bring consolidated actions in State court. Professor Elliott will know one case in which he was involved, 8,000 cases were consolidated, not as a class action—those can be maintained in State court—so that there is a forum in which every individual can bring his or her lawsuit, and those can be maintained in Federal court, if they meet the minimum standards of rule 23, which are, at heart, due process standards.

Mr. GOODLATTE. And it seems to me that if you have a case involving citizens from 30, 40, 50 States, and millions—in some instances, even billions—of dollars involved, that truly is something that our Federal courts were designed to handle, as opposed to our State courts.

Mr. DELLINGER. Indeed. And I think the federalism objection—I have two quick points to make about the federalism objection to your bill. The first is just a note that I believe this is the first time in the 7 years of the administration of President Clinton that this administration has objected to any act of Congress on the grounds that it impinged upon States' rights, so this almost at the end of the administration that they first found a bill that they thought raised a States' rights problem, but more seriously, this is not just a false federalism problem, as Mr. Beisner has aptly put it, in some sense, that objection is upside-down.

You have a situation in many instances in which the laws that govern the citizens of 43 other States, or 49 other States, are being determined by the courts of one State. That is not a federalism interest, that turns it upside-down.

Mr. BELL. If this impedes on federalism, then article III of the Constitution does, as well as the first Judiciary act of 1791.

Mr. DELLINGER. Judge Bell's point is that since the beginning of the Republic, we have thought it appropriate for some issues, based on State substantive law and involving citizens of that State, to be tried in Federal court where there is a multi-State element. What Congress is appropriately charged with deciding is which of those cases from time to time ought to be in which court. And this bill, your bill, is carefully crafted, I think—and very thoughtfully so—to define one of the most important category of cases for which a neutral Federal forum would be most appropriate. But just on that federalism claim, see the *New York Times* article from September 27, 1998, about suits against auto insurers could affect nearly all drivers. It is not necessarily a pro-consumer or anti-consumer issue because here is a lawsuit based on the class of every American whose auto parts have been replaced with a generic part. It would prevent the use of generics.

Now, many consumer advocates consider the competition from generic products to be good for consumers, including Mr. Nader's

organization. And yet, as the *Times* article notes, one State—in this case, Illinois—is setting a rule for others. The insurance commissioners and attorneys general see another issue and noting that this would be different from the approach taken by the insurance regulations of New York, which encourage the use of generic parts; the law in Massachusetts, which requires their use; Hawaii, which permits the use of manufacturers' parts only, if it is a higher cost part, if the consumer pays the difference—all of these are policy choices of those States set aside by the courts of one State. That is not a true federalism concern and, therefore, your bill appropriately puts these cases where they belong.

Mr. GOODLATTE. If you could make that available to us, we will put that in the record. I think that is a very good point. And we very much appreciate our friend's new-found interest in States' rights, we just feel it is misplaced in this instance.

I am glad to recognize the co-patron of the bill, the gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman. Mr. Beisner, let me get you, in the time allotted to me this afternoon, to respond to some of the claims that were made by opponents of the legislation earlier today—in particular, the claim that if our legislation passes, that virtually all class action litigation would be elevated to the Federal courts. Secondly, that if the legislation passes, it would mean the death of tobacco class action suits. And then, third, to the extent you didn't address this issue before—I was out of the room while Mr. Goodlatte was asking most of his questions—talk a little bit about the caseload trends in the State courts as compared to the Federal courts, and the implications that those trends have for workloading in the two levels of courts in the event that our legislation passes.

Mr. BEISNER. Let me start first with the question about cases being elevated to the Federal courts from the State courts. I do not believe that that will be a result of this bill, for several reasons. First of all, as Mr. Struve pointed out earlier, I believe that in many jurisdictions, practitioners who are defending class actions will make the judgment that they are perfectly happy to remain with their cases in State court. I think New York is an example of that.

And so the suggestion that every class action that is filed will automatically be removed to Federal court by the defendant, I think, is just dead wrong.

I think that the scope of the exceptions that have been placed in the bill have been mischaracterized as being exceedingly narrow. I would note, for example, the hypothetical that Mr. Wolfman posed earlier about the West Virginia telephone company lawsuit. He posited, as I recall, that it was fundamentally a lawsuit by West Virginia residents against the West Virginia subsidiary of Bell Atlantic and against Bell Atlantic.

We need to remember this bill doesn't change the capacity of the plaintiff to decide who the defendants are going to be, and I am quite sure that if the people who brought that lawsuit wished that case to be in State court, they simply wouldn't sue Bell Atlantic, they would sue the subsidiary, which is certainly no more or no

less liable than the parent for whatever was involved in that case. That case would stay in State court, under this bill.

Turning to your question about the tobacco cases, I think that the black-and-white statement that tobacco class actions won't be certified in Federal court, they will be in State court, I am just not sure there is support for that proposition. There have been some tobacco cases that have been certified in Federal court. As, I think, Professor Daynard concluded, or acknowledged, there are a number that State courts have declined to certify. I think it depends on what kind of case you are talking about.

The main test in Federal court was in the *Castano* case, which was a 50-State, throw-in-all-the-claims sort of lawsuit that is not going to pass muster in most Federal or State courts. And so I think that that proposition that all will be certified in State courts and all will be certified in Federal courts—I am not suggesting that is necessarily what you are saying here—but this notion there is a black-and-white proposition that one is a preferable forum to the other, I don't think is completely accurate.

On the caseload issue, I would note the following. One of the concerns that I think needs to be pointed out here about caseload is the notion that you have got to look at the entire judicial system. Everyone seems to have expressed concern about caseload in the Federal courts, but the caseload issue exists as far as the State courts are concerned as well. Yes, there are more State court judges, but according to statistics from the Court Statistics Project in 1998, civil filings in State trial courts of general jurisdiction have gone up 28 percent since 1984, in the Federal courts the increase has been only 4 percent.

If you look at the Administrative Office of U.S. Court Statistics, for last year, through March 31, diversity of citizenship filings are down 6 percent. If you look at the year-end filings that haven't been published yet, I don't believe, they are down even more. And, yes, we are putting pressure on the entire court system, with the increase in the number of class actions, but I think to say that just by keeping out of Federal court you are solving the problem does not really convey the whole picture.

Mr. BOUCHER. Thank you, Mr. Beisner. Thank you, Mr. Chairman.

Mr. GOODLATTE. Thank you, Mr. Boucher. The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman. I will address H.R. 2005, the 18-year statute of repose. Mr. Mack, you first, if you wouldn't mind. Could you walk us through the preemption section again? How would the statute of repose work in States that have statutes that cover all products, not just durable goods, and what about States that do not set any statute of repose?

Mr. MACK. Thank you, Mr. Chairman. First of all, as I indicated in my written statement and in my oral statement to the committee, this bill contains two-way preemption, which is to say that if a State—Ohio or Illinois—Ron Grample has a shorter period of repose than 18 years (and all of the 13 States that have time-limited statutes of repose are shorter than 18 years): with respect to claims that are covered under H.R. 2005, claimants in those States would have an additional period of time beyond what is now per-

mitted under State law, to bring their lawsuit. That could vary all the way from 12 years in North Carolina, which has a 6-year statute of repose, to 3 years in Texas, which has a 15-year statute of repose.

To my knowledge, I think only one State has the sort of construct that this bill has, which is that its purview is limited to capital goods used in the workplace. So that if you have, in the other 12 States (Connecticut being the one that does make a distinction in their State statute between workplace and nonworkplace claims) a statute of repose of whatever duration that covers all products: under the preemption provision that is in H.R. 2005, any product or claim that is not specifically covered by this act, or involves a product not subject to this act, is governed by applicable State law. So in those 12 States the statute of repose governing other products, whatever they are, would continue to operate.

There are eight States, as my testimony indicates, which have statutes of repose that, loosely described, are based on the useful safe life of the product. The problem, from our perspective, with those statutes is that you still need to litigate what constitutes useful safe life in those States; and a principal objective of this legislation, which is to reduce transaction costs, is not accomplished. Those States, with respect to workplace products covered by H.R. 2005, would be preempted.

And then, finally, the States that do not have any statute of repose at all, to the extent that claims arise involving products that are covered by this act, i.e., workplace products, except for those excluded by this act, would provide an 18-year statute of repose in those States.

Mr. CHABOT. Thank you. Mr. Bantle, wouldn't you agree that the parties who have made subsequent modifications, even removed factory-installed safety devices, over such a long period of time—Mr. Chairman, I ask for one additional minute to complete my question and to give the gentleman time to answer.

Mr. GOODLATTE. Without objection.

Mr. CHABOT [continuing]. Even removed safety devices over such a long period of time, should be the ones held responsible for workplace injuries, not the original manufacturers who designed state-of-the-art safe machines decades ago?

Mr. BANTLE. Well, it is certainly true that those are all things that could be used as defenses if the original manufacturer is sued, and certainly if those modifications were the cause of the injury, those making the modifications should be held responsible, if they can be under law. Under most workers' compensation laws, if it was the actual employer of the injured person that made the modifications, they probably can't be held further responsible. But I don't disagree with your premise.

Mr. CHABOT. Thank you very much.

Mr. GOODLATTE. Thank you. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you. Mr. Bantle, under present law, if, in the 20th year after a product has been sold, the manufacturer finds out that there is a real danger for which there is a very inexpensive fix, under present law, if he doesn't do something at that point, he

is subject to liability under negligence, and if it is an outrageous case, possible punitive damages.

If we were to pass this bill, what would be the incentive for the manufacturer to cheaply perform the fix?

Mr. BANTLE. There would be none.

Mr. MACK. Mr. Chairman, could I respond?

Mr. SCOTT. Well, let me ask another question, then I will let you respond. According to the bill, the durable good includes any component of such product. If, without any incentive, out of the goodness of the manufacturer's heart, they actually do the fix and add a little component to it, would that start the clock all over again?

Mr. BANTLE. I think it very well might.

Mr. SCOTT. And so there would be, in fact, a disincentive to do the fix. Mr. Mack, I am going to let you respond. Let me ask you a question first. On the toxic harm exception, would asbestos cases be not covered by this bill under that provision?

Mr. MACK. If you are asking my opinion, I don't see how they would be, but——

Mr. SCOTT. Is that what is meant by the exception?

Mr. MACK. It is an interesting question, Mr. Scott. I think when this committee passed its bill out in 1995, you used the word "latent" harm. The word "toxic" harm was added in the Senate in 1995, and then accepted in the Conference report in 1996. The administration insisted, during its negotiation over the bill in 1997 and 1998, on continuing to use the word "toxic" harm; and also, if I might add, did not go along with defining it. So, the committee may want to define it in report language.

Mr. SCOTT. I don't want to cut you off, but I don't have much time. I think what your answer is that it is not clear, and as a representive of an area where this is a major concern, if it is not clear to you, then it would need an amendment.

Mr. MACK. Mr. Scott, it would be difficult for me to imagine a court that would not exclude asbestos cases. But—can I respond to your earlier question?

Mr. SCOTT. Well, let me give you two questions. If we were to pass this bill, the employer would get stuck with the workers' compensation whereas, if we don't pass the bill, the employer would be entitled to subrogation under the negligence claim, is that right?

Mr. MACK. In most jurisdictions, employers, regardless of their fault, are able to shift the entire cost of their workers' compensation on to manufacturers. As a matter of fact, we have found that a lot of claims are brought by insurers to collect the subrogation lien; and the claimant gets very little of the recovery when the case is settled.

But under this bill, with respect to overage equipment, an employer would be encouraged to maintain the equipment safely and would be encouraged to assure that it is equipped with safety devices and the like——

Mr. SCOTT. The employer, because he is on the hook for the workers' comp, but not the manufacturer, because we just let him off the hook under the statute of repose.

Mr. MACK. Well, Mr. Scott, this gets to the response I wanted to make to the question that you posed to Mr. Bantle. More often than not, our members don't even know where this equipment is.

It is out of our control. As my testimony indicated, I sell it to you, and then when you buy a new piece of equipment, you sell it to Mr. Goodlatte, and Mr. Goodlatte, when he buys a new piece, sells it to Mr. Chabot. I have no idea where it is.

A number of years ago, one of our members, tried to find out where their equipment was located, ran ads in trade magazines that said, "We will pay a prize to the owner of the oldest piece of our equipment that is out there and still in use. Fill out who you are and the serial number, and send it back to us." Now, they were able to get back a fair number of these coupons.

The machine that won was a machine that had been used to stamp out a part for the first Smith Corona typewriter that was ever made. At the time the coupon was sent back it was being used to stamp out a part for the Apollo Moon Shot. It was over 100 years old. Actually, I think the machine is over in the Smithsonian because our member bought the machine and donated it.

Now, can anyone on this committee tell me that it would be fair, under any system of justice, if that machine had been the subject of a lawsuit involving injury to someone, to bring an action against the manufacturer of that machine? It is 100 years old.

Mr. SCOTT. Mr. Chairman, if I could have 10 seconds. I think you have the other side of the coin where someone knows the product is dangerous and doesn't want to do anything about it because we passed a bill, and if they fixed it, the 18-year clock would start up again, and if you are the injured party you would like to know and like to be warned.

Mr. MACK. I think, Mr. Scott, in point of fact, the bill does say that the manufacturer of the machine's liability ceases after 18 years. Even if the manufacturer of the machine supplied a component, or a replacement part. I agree with you, you don't want to discourage that, that is not good public policy, and the bill doesn't do that, contrary to Mr. Bantle's interpretation. However, if the management rebuilds the machine——

Mr. SCOTT. I apologize, Mr. Chairman, but if you define component part, you define component part, you define durable good to include a component part. Mr. Chairman, I know I am way over time, and I apologize.

Mr. GOODLATTE. I thank the gentleman. The gentlewoman from Texas is recognized.

Ms. JACKSON LEE. Mr. Chairman, you have presented us with such an interesting mix of issues, and I guess I will offer an apology early, only because the light probably will go on on me, but this is, I think, a very productive hearing and discussion, and let me thank you for your indulgence.

What I would offer to the gentlemen and the panelists that are here—I don't see any ladies on the panel, I won't take anything from that—but what strikes me particularly in H.R. 1875, jurisdiction of district courts, immediately, section (b)(1), the qualifiers suggest that almost automatic removal occurs when any member of a proposed plaintiff class is a citizen of a State different from any defendant.

Now, what I glean from that, that if you have 50 plaintiffs from Texas, you have a defendant from Texas, and the 51st defendant

from Mississippi, it seems to me that I am reading that that has a strong possibility of removal.

Chairman Struve, if I have your name correctly, can you share with me what that does to the access of justice, if that is to be the interpretation?

Mr. STRUVE. Well, the reason why we said that the effect of this legislation would be to remove virtually all class actions into the Federal courts is that even in a case—let us amend your hypothetical slightly so that there are 51 plaintiffs from Texas and one defendant from Texas, totally under Texas law, a completely localized situation. We live in a very mobile society. Roughly 10 to 15 percent of the telephone numbers change every year. A lot of those are out-of-State.

So, in the short period of time that it might take from the time the cause of action accrues until the class action is brought, the probability is that at least one of those people, originally a Texan, will have moved to Louisiana, to Mississippi, to you name it, and that creates the minimal diversity necessary for——

Ms. JACKSON LEE. Immediately triggers it.

Mr. STRUVE. That is right.

Ms. JACKSON LEE. Immediately triggers it.

Mr. STRUVE. That is right. And then the Federal judge does not have any general discretion, under this bill, to, for example, say, this thing has been removed for essentially frivolous and tactical reasons, or the center of gravity of this is in the State courts, I am going to send it back. It can only be sent back if it fits within one of these three exceptions. And let me explain to you why our committee considered these very narrow exceptions.

Ms. JACKSON LEE. And would you round up. I have got such a number of questions, but I want to hear your response. Go ahead and give your response.

Mr. STRUVE. Let me stop there, I would rather hear your questions.

Ms. JACKSON LEE. We are a mutual admiration, but why don't you finish your sentence.

Mr. STRUVE. What I was going to say is that, for example—here is an example of a basically intrastate dispute that would not be within the intrastate exception crafted here. Say, you have got a plant that has allegedly been polluting the surrounding area for 50 years, and a class action brought on behalf of residents of that area. Now, if any one of those residents has moved out of the area during that period, minimal diversity exists and, also, if the corporation that owns the plant happens to be headquartered and incorporated out of State, even though it is a predominantly local operation that is being litigated, diversity will exist.

Ms. JACKSON LEE. Thank you for that. Let me just ask Mr. Dellinger, who I know has been at the highest levels of government as it relates to his presence in the Federal court system, do you feel that the Federal judiciary is lazy and abdicates its responsibility, or do you feel that you have a fairly competent and qualified Federal judiciary, albeit we need additional appointments to vacancies?

Mr. DELLINGER. I do think they are competent and well qualified.

Ms. JACKSON LEE. With that, let me offer to you then the remarks of the—and they may have already been offered, but I find

them particularly striking—the Conference of Chief Justices stated recently, "We believe that H.R. 1875, in its present form, is an unwarranted incursion on the principles of judicial federalism underlying our system of government. In essence, it would unilaterally transfer jurisdiction of a significant category of cases from State to Federal courts."

How do you comport your presence here today, former Solicitor General, with the idea that our Chief Justices, along with our Chief Justice, who was speaking about criminal cases, indicated—I would ask the chairman for an additional 2 minutes.

Mr. GOODLATTE. Without objection.

Ms. JACKSON LEE. Thank the chairman very much—and I would appreciate a brief answer because I have some questions on the other legislation, but I thank you.

Mr. DELLINGER. Two responses. First, Ms. Jackson Lee, I think that it is perfectly understandable that officials of State courts would prefer not to have their cases removed to the Federal court system, and that would be true whether those are diversity cases already within it, whether it is true of civil rights cases, whether it is true of any range of cases, I don't find it surprising that they would take that position.

With respect to Chief Justice Rehnquist's comments about diversity jurisdiction and the workload of the Federal courts, I think it is important to understand that it may well be early in the next century Congress is going to have to take an overall look at the jurisdiction of the Federal courts and see if there is too much of a burden being placed on those courts. If you were to pass this bill, and if in ten or 15 years you were to look back at the overall jurisdiction of the Federal court, these cases, I would suggest, would not be candidates for being taken out of the Federal court system because of their national economic impact.

Ms. JACKSON LEE. Let me—and I appreciate your response to that, I may have an additional question for you—but I am reminded of a quote by Chairman Hyde that was offered by my colleague earlier today, noting that State court judges go to the same law schools and develop the same excellence as Federal courts, and I would think that the Chief Justice, albeit it State courts, would not be writing a self-serving statement. So I appreciate your answer, but I am not sure if it totally answered my question about the legal reasoning behind Chief Justices of the States saying that. I don't think State courts are without the ability to have things to do, they are very busy. And I don't think they would argue a point simply on losing jurisdiction of a case.

Let me move to the gentleman from the Public Citizen, if I might, and have him discuss with me testimony that he offered on page 4. I believe this is Mr. Bantle. I am very fascinated with this, dealing with the legislation H.R. 2005 because I always like to have the government in a position to fix a broken problem.

You seem to suggest that there is little evidence that there is a liability crisis in product liability. Earlier today I have already talked about the distinguishing of a right. Can you explain that further for me, please?

Mr. BANTLE. Well, I think you have said it. We don't have any evidence before us that there is a real liability problem, in particu-

lar with cases concerning items that are 18 years old. But we do know that there are individual workers who are hurt by those items, whose claims would be extinguished by this legislation, and that is our concern.

Ms. JACKSON LEE. I have one last question, Mr. Chairman—I don't know if my 2 minutes is gone——

Mr. GOODLATTE. It has, but go ahead and ask one more.

Ms. JACKSON LEE. Thank you, Mr. Chairman. I am just trying to clarify for the record, because I noticed that there was a listing here—and I am not sure if it is complete—and I am trying to ask Mr. Dellinger, is he here on behalf of O'Melveny & Myers, as an interested observer, or is he here out of enumeration, representing the same clients as some of the other panelists are in this instance. Mr. Dellinger?

Mr. DELLINGER. My firm represents a number of clients who have interest in class action matters.

Ms. JACKSON LEE. So you are with the firm of O'Melveny & Myers?

Mr. DELLINGER. Yes.

Ms. JACKSON LEE. And are you being renumerated for your presence here today?

Mr. DELLINGER. I hope so.

Ms. JACKSON LEE. Mr. Chairman, I would like to offer into evidence a letter from Handgun Control, dated July 19, 1999, on the impact of H.R. 1875.

Mr. GOODLATTE. Without objection, it will be made part of the record.

[The information referred to follows:]

HANDGUN CONTROL, INC.,
Washington, DC, July 19, 1999.

Hon. JOHN CONYERS, JR.,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR REPRESENTATIVE CONYERS: As the House Judiciary Committee prepares to markup H.R. 1875, The Interstate Class Action Jurisdiction Act of 1999, I ask you to consider the inequities contained in the bill.

Under current law, class actions may be litigated in state or federal court. To a large extent, this choice of forum is up to the injured class member plaintiffs, since they can keep a lawsuit in state court if any plaintiff and any defendant are from the same state. Defendants cannot remove the case to federal court unless and until all defendants are from a state different from any plaintiff.

The proposed bill would turn this rule on its head. Under the new rule, if any member of a proposed plaintiff class is a citizen of a state different from any defendant, the case can be removed from state to federal court. Thus, even if all but one of the plaintiffs were from a single state, and the primary defendant was also from that state, if even one other defendant or plaintiff was from a different state, the case would end up in federal court. Moreover, this removal motion can be made by any defendant, and can be made at any point in the case (eliminating the one-year statute of limitations on removal motions).

How does this impact gun litigation? Federal courts tend to be much more conservative in interpreting state law than do state courts. Their expertise is federal, not state, law. Yet, according to the Erie doctrine, in personal injury or product liability cases, federal courts must apply state law. Moreover, they must apply it by guessing what a state court would do in a similar situation. Since this is not their primary domain, federal courts tend to be very reluctant to extend state law or apply it to new situations. With gun litigation, however, many cases require courts to extend the law, or to apply established law to a new situation (e.g., the July 1993 101 California Street assault weapon massacre).

There are numerous examples of this conservative approach, but two come to mind. In *McCarthy* v. *Olin*, 119 F.3d 148 (2d Cir. 1997), the Second Circuit, in a

2–1 decision, declined to certify to state court the question whether it was negligent for Olin Corp. to have sold the "Black Talon" hollow-point ammunition which was used by Colin Ferguson in the Long Island Railroad massacre. The dissenting judge, Guido Calabresi, argued that the case should have been certified to the New York Court of Appeals since, given the novelty of the tragedy, it may well have extended its law to find liability. The Second Circuit, however, dismissed the case. Similarly, in *Bubalo* v. *Navegar*, 1998 U.S. Dist. Lexis 3598 (N.D. Ill. 1998), the court dismissed a case involving the murder of a police officer by an assault weapon brought under a novel public nuisance cause of action. Although it allowed the case to proceed in an initial opinion, on reconsideration, the federal court dismissed, holding that "this court is reluctant to recognize a new theory of nuisance liability under Illinois law without a more solid foundation in the state decisional law." Id. at *14–15.

We believe that present law which gives injured plaintiffs greater latitude to determine the forum, is ultimately more fair.

Sincerely,

ROBERT J. WALKER, *President*.

Ms. JACKSON LEE. And I am not sure whether a colleague of mine put in the letter of the Conference of Chief Justices. I see that that has already been admitted. And I thank you, Mr. Chairman, for your indulgence.

Mr. GOODLATTE. Thank you. We thank this panel. You have all been duly renumerated today, and we thank you for your participation and your testimony, and this hearing will stand adjourned.

[Whereupon, at 3:15 p.m., the committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

JUDICIAL CONFERENCE OF THE
UNITED STATES,
Washington, DC, July 26, 1999.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: On behalf of the Judicial Conference of the United States, I write to inform you that on July 23, 1999, the Executive Committee of the Conference voted to express its opposition to the class action provisions in H.R. 1875 and S. 353, in their present form. The Committee noted, among other things, its serious concern about the practical effect these bills would have on the caseload of the federal courts by shifting a significant number of class actions from the state to the federal courts. Concern was also expressed about the conflict between these provisions of the bill and long-recognized principles of federalism. The Executive Committee encouraged further deliberate study of the complicated issues raised by class action and mass tort litigation.

We will be providing the committee with a more detailed explanation of our opposition in the near future; however, in light of the markup of H.R. 1875 now scheduled for July 27, 1999, we wanted to provide you with our general position. The Judicial Conference greatly appreciates your consideration of these views in the ongoing deliberations of class action legislation. If you or your staff have any questions, please contact Mike Blommer, Assistant Director, Office of Legislative Affairs (202–502–1700).

Sincerely,

LEONIDAS RALPH MECHAM, *Secretary.*

cc: Honorable John Conyers, Jr., Ranking Member
Members of the Committee on the Judiciary

STATE OF NEW YORK,
OFFICE OF THE ATTORNEY GENERAL,
Albany, NY, July 27, 1999.

Hon. J. DENNIS HASTERT, *Speaker,*
House of Representatives, Washington, DC.

Hon. RICHARD GEPHARDT, *Minority Leader,*
House of Representatives, Washington, DC.

Re: HR 1875; Interstate Class Action Jurisdiction Act of 1999

DEAR MR. SPEAKER AND MR. MINORITY LEADER:As Attorneys General of the States of New York, Oklahoma, Connecticut, Florida, Idaho, Iowa, Kansas, Massachusetts, Minnesota, New Hampshire, Oregon, Pennsylvania, Vermont, Tennessee and West Virginia, we are writing to express our strong objection to H.R. 1875, the "Interstate Class Action Jurisdiction Act of 1999."

The class action device is an important vehicle for the redress of small claims that might otherwise not be remedied. In a time of tight governmental budget constraints, the availability of private consumer class actions serves an important "private attorney general" function in policing manufacturers and merchandisers who engage in practices that result in economic harm to consumers on a broad scale. At the same time, many state Attorney General offices have expressed grave concerns

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about class action abuses in testimony submitted in response to proposed amendments to Rule 23 of the Federal Rules of Civil Procedure and in amicus briefs filed in cases before the United States Supreme Court, including *Amchem Products, Inc.* v. *George Windsor et al.*

While we agree that there should be efforts to address the problem of class action abuses, we believe the approach embodied in H.R. 1875 would do far greater harm than good. In fact, passage of this legislation would fundamentally reorder basic principles of federalism and could destroy the class action device itself.

H.R. 1875 seeks to federalize most state court class actions. The bill would add to existing federal question and diversity jurisdiction a wholly new basis for federal court jurisdiction—"class action jurisdiction." Most class actions would be filed in or removed to federal court as, with very few exceptions, the federal courts' jurisdiction would be invoked whenever a plaintiff class member (named or unnamed) is from a different state from any defendant. Such a radical transfer of jurisdiction in cases that most commonly raise questions of state law would undercut state courts' ability to manage their own court systems and consistently interpret their state's laws. At the very least, such a sweeping change in our federal system should not be made without a compelling record in support.

Equally troubling is the practical impact of H.R. 1875. If it were to become a law, the availability of class actions as a device to redress consumer harm would be substantially diminished. The federal judiciary faces, a serious challenge in managing its current caseload. Indeed, Chief Justice Rehnquist has pointed out that the ability of the federal courts to administer justice has been seriously challenged by numerous judicial vacancies at a time of ever-increasing federal court dockets. Transferring state court class actions to that already overburdened court system will effectively ensure the unavailability of this important tool for consumer redress. Curbing class action abuses can be accomplished by measures which avoid such unintended consequences.

We fully support the efforts of the House Judiciary Committee to address the problem of elm action abuse and we stand ready to offer our assistance in any way. We strongly believe, however, that H.R. 1875, which would fundamentally reorder our federal system and seriously diminish the availability of the class action device, is not an appropriate solution.

Very truly yours,

ELIOT SPITZER, *Attorney General of the State of New York.*

W.A. DREW EDMONDSON, *Attorney General of the State of Oklahoma.*

NATIONAL ASSOCIATION OF MANUFACTURERS (NAM),
Washington, DC, July 20, 1999.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: On behalf of the 14,000 members of the National Association of Manufacturers, thank you for holding the July 21 hearing on H.R. 1875, the Interstate Class Action Jurisdiction Act. The NAM would appreciate your including this letter in support of H.R. 1875 as part of the hearing record.

The Interstate Class Action Jurisdiction Act is a long-overdue update of statutes dealing with federal jurisdiction that require a minimum of $75,000 in dispute per plaintiff. At the time those statutes were written, modern-day class-action claims—which often involve little money per claimant but represent billions of dollars of liability for defendants—were not contemplated.

In addition, far too many class-action claims that are heard in one state's court system affect the laws in other states. Thus, it would be appropriate for federal courts to have jurisdiction over nationwide, multi-million dollar lawsuits.

H.R. 1875 will not deprive any legitimate class-action claimants of their day in court. It is procedural only. Specifically, H.R. 1875 would allow any plaintiff or defendant to remove a class-action case to federal court if the amount in dispute is $1 million or more; if the class has at least 100 members; and if any class member is from a state different than any defendant. Provisions ensure that truly local cases would continue to be heard in state courts.

The Interstate Class Action Jurisdiction Act enjoys broad, bipartisan cosponsorship. The NAM hopes that the Committee on the Judiciary will be able to report H.R. 1875 with a favorable vote as soon as possible.

Sincerely,

MICHAEL E. BARODY, *Senior Vice President, Policy, Communications and Public Affairs.*

cc: Members of the House Committee on the Judiciary

NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS (NAW),
Washington, DC, July 22, 1999.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: I write on behalf of the National Association of Wholesaler-Distributors (NAW) to express support for H.R. 1875, the "Interstate Class Action Jurisdiction Act of 1999." If enacted, H.R. 1875 will improve both the fairness and the efficiency of our legal system. I urge the committee and the Congress to take favorable action on this legislation at the earliest possible date.

There can be little doubt that the nation's civil justice system encourages excessive forum shopping by personal injury attorneys who seek to bring claims in what they perceive to be the most favorable jurisdiction for their client. A key goal of forum shopping is to have an in-state plaintiff against an out-of-state defendant in a local state court, as contrasted with a neutral Federal court.

Current rules governing the jurisdiction of the Federal courts in class actions encourage personal injury lawyers to achieve this goal through unfair forum shopping. Because there is no Federal jurisdiction where, among other things, there is not *complete* diversity of citizenship between all plaintiffs and all defendants, a plaintiff attorney wishing to bring a class action in a state rather than a Federal court will join as a defendant a clearly innocent party for the single purpose of defeating diversity, thus ousting the Federal courts of jurisdiction.

Our membership is unfairly hurt by this forum shopping process. For example, in product liability actions, clearly innocent wholesaler-distributors are routinely joined as defendants solely to preserve state court jurisdictions. By way of contrast, actual verdicts against non-manufacturers occur in less than five percent of all product liability cases. The legal costs and time needlessly spent by small business wholesaler-distributors as a result of such forum shopping serve no constructive purpose.

H.R. 1875 effectively addresses this problem with regard to class action cases and provides Federal jurisdiction where there is any diversity of citizenship between plaintiffs and defendants. As a result, it eliminates the existing incentive for personal injury attorneys to name local wholesaler-distributors in product liability actiona as a tactic to oust neutral Federal courts of their jurisdiction.

It is our understanding that amendments may be offered at markup that propose to exclude certain products and industries from the scope of this legislation. NAW strongly opposes any such amendment. NAW members distribute a wide variety of products; there is no legal or practical difference between a business that acts as a wholesaler-distributor of soft drinks, lawn mowers, tobacco, machine tools or other lawful products.

We firmly believe that procedural and substantive rules governing the adjudication of civil actions including class action cases must be based on sound legal policy, not *ad hoc* decisions about whether a particular defendant or product is favored or disfavored. Should any product or industry be "carved-out" of this legislation, the benefits of H.R. 1875 would be outweighed by its flaws and we will not hesitate to reevaluate our position on the bill as amended.

Mr. Chairman, on behalf of the 40,000 companies nationwide that are affiliated with NAW, I thank you for your leadership on this important measure and for your continuing commitment to restoring fairness and balance to our civil justice system.

Sincerely,

DIRK VAN DONGEN, *President.*

cc: Members of the House Committee on the Judiciary

AMERICAN TORT REFORM
ASSOCIATION (ATRA),
Washington, DC, July 22, 1999.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

Re: Class Action Reform Legislation

DEAR CHAIRMAN HYDE: I am writing on behalf of the 300 businesses, corporations, municipalities, associations, and professional firms who belong to the American Tort Reform Association ("ATRA") to indicate our strong support for H.R. 1875, the "Interstate Class Action Jurisdiction Act of 1999." ATRA believes that complex multi-state class action cases belong in federal court in order to improve uniformity in judicial decision-making and efficiency in the adjudication of class actions.

ATRA understands that, during mark up, some opponents of the class action reform legislation may offer amendments to exclude particular products or groups of defendants from the bill's coverage. ATRA strongly opposes such "carve-outs," because they would constitute unsound public policy.

Federal court jurisdiction does not and should not depend on the identity of a particular industry or the type of product or service at issue. All federal statutes governing civil actions including the federal "diversity of citizenship" statute, 28 U.S.C. § 1332—are general in their application. The same is true with respect to all federal rules governing civil actions (*i.e.*, the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence). These statutes and rules make no distinction between particular products or industries.

Class action reform legislation must apply in the same general manner for historical and common sense reasons. "Carve-outs" would create an unworkable system that would undermine the legitimate goals of uniformity in decision-making and efficiency in the adjudication of class actions that the legislation seeks to promote.

For example, if a particular class involved some defendants who were covered by the legislation and others who were not, how would the case be treated? It would seem that the legislation would require the case to be split into two different cases, one in federal court and the other in state court. This would require two entirely separate litigations over the same subject matter, resulting in substantially greater legal expenses for both plaintiffs and defendants, additional delays, and potentially conflicting results.

Furthermore, ATRA would be concerned that once there is a precedent for excluding a particular industry or subject of litigation, the exceptions to the legislation could quickly swallow the rule. The statute could be weakened to the point that it might not apply in any case in which it would actually be useful. Mass tort class actions, by their very nature, involve controversial subjects (*e.g.*, asbestos, chemicals, pharmaceuticals, tobacco, and firearms). These subjects and others are all likely targets for future exclusions.

We appreciate you considering the views expressed in this letter.

Sincerely,

SHERMAN JOYCE, *President.*

cc: Representative Bob Goodlatte
Representative Rick Boucher

PREPARED STATEMENT OF MARK J. NUZZACO, DIRECTOR, GOVERNMENT AFFAIRS, NPES

I. NPES and the Graphic Communications Industry

NPES The Association for Suppliers of Printing, Publishing and Converting Technologies is a U.S. trade association whose over 400 member companies are engaged in the manufacture and importing for sale or distribution of machinery, equipment, systems, software and supplies used for design, assembly, production and distribution of information by companies in the graphic creation, design, prepress, package printing/converting, finishing and publishing industries.

NPES member companies provide the technological foundation for one of the largest industries in the United States—graphic communications. 400 NPES members provide the essential equipment and supplies for an industry that includes more than 65,000 firms, employs more than 1.5 million people, and records almost $300 billion in annual sales. The Graphic Communications industry ranks in the top 10 manufacturing employers in the United States

II. Both the Congress and the Administration have Previously Endorsed a Federal Statute of Repose for Durable Goods used in the Workplace

On behalf of NPES' over 400 member companies we commend the leadership of Congressman Steve Chabot and his cosponsors, representatives Louise Slaughter, John Shimkus, and Marcy Kaptur for introducing H.R. 2005, the "Workplace Goods Job Growth and Competitiveness Act of 1999". H.R. 2005 is a bill to enact a national statute of repose for durable goods used in a trade or business, which would bar liability claims from being filed against the manufacturer or seller of a durable good more than 18 years after the durable good was delivered to its first purchaser or lessee. Application of the bar on claims would be limited to workers who have received or are eligible to receive workers' compensation, and whose injury does not involve a toxic harm.

The concepts embodied in this legislation are not new. Indeed, provisions similar to those of H.R. 2005 have been found in numerous omnibus product liability proposals which have been introduced in every congress since the mid-1980s. What is new and different, this year and for this Congress, is that H.R. 2005 deals only with the single issue of overage workplace products. As other supporters of the legislation have pointed out, H.R. 2005 does not address other product liability issues for which consensus has not yet been achieved. Moreover, the bill is identical to the statute of repose provisions contained in product liability legislation agreed upon for consideration in the 105th Congress, which was the product of extensive negotiations between the White House and a bipartisan group of congressional leaders. But for disagreement on other issues surrounding that legislation, the statute of repose contained in H.R. 2005 might well be law today.

III. H.R. 2005 Addresses the Interface of Workers' Compensation and Product Liability Tort Law

Some have suggested that using a statute of repose to address the relatively small number of product liability cases that arise in the workplace is analogous to repairing a Swiss watch with a sledgehammer. While we do not think the metaphor apt, at least it does seem to recognize that there is a problem with the current interface of workers' compensation and product liability tort law in the workplace. We agree that there is something wrong with a system that looks to a relatively small number of relatively small capital goods manufacturers to underwrite millions of industrial workplaces where there is the potential for product-related injuries. This is especially inequitable in light of data which shows that the great majority of injuries suffered on overage workplace durable goods do not result from product defects, but are more typically due to other factors beyond the control of product manufacturers or suppliers. Regrettably, these other factors often include unsafe acts and/or conditions over which manufacturers have no control, and of which they may not even have knowledge until a product liability claim is filed against them. Indeed, in the case of overage equipment, many times the manufacturer does not even know where the product is years after its original sale and subsequent resale.

While there may well be other more "surgical" approaches to remedying these interface problems, such as adopting other provisions in former omnibus product liability reform packages, the political reality is that they have not been able to be enacted into law. Moreover, even with some of these more particularized reforms we would still be left with the burden and inefficiency of high transaction costs stemming from repeatedly litigating these questions in cases involving overage products, the vast majority of which defendant manufacturers win when they go to trial.

In that regard, a substantial and compelling record in support of a national statute of repose as embodied in H.R. 2005 has been developed by previous congressional fact finding. This record remains relevant and provides a rational basis for congress to enact H.R. 2005. This record was once again referenced and reiterated by supporters of H.R. 2005 at the Committee's July 21, 1999 hearing, and NPES concurs with that testimony. However, we are taking this additional opportunity to respond to several comments raised in opposition to H.R. 2005 at that hearing.

IV. Repose for Liability Incurred on Overage Workplace Durable Goods should be addressed at the Federal Level

The Constitution of the United States gives the U.S. Congress power to legislate over matters of interstate commerce. There is recent precedent supporting the use of this power in matters of product liability. Specifically, Congress has enacted the General Aviation Revitalization Act of 1994, which includes an 18-year statute of repose, and last year's Biomaterials Access Assurance Act.[1] However, opponents of H.R. 2005 continue to argue that such laws "represent a major interference with the

[1] Public Laws 103–298 and 105–230 respectively.

traditional authority of state legislatures and state court judges and juries in civil cases." Given these recent precedents, we are surprises to find argument raised once again.

Congress' authority under the Commerce Clause of the Constitution is invoked in this instance because manufacturers of capital goods sell their products nationwide. Moreover, once these products are introduced into the stream of commerce, they can be and often are resold in other states, leaving the original manufacturer exposed to a patchwork of liability laws. Claimants in a suit can, and often do, take advantage of this patchwork by forum shopping for jurisdictions with the most favorable law, thus making it difficult, if not impossible for individual states to effectively regulate their own marketplaces, and dispelling the possibility of nationwide uniformity of treatment.

In order to standardize this patchwork and create a stable business environment where the treatment of plaintiffs and defendants in overage product cases is the same in California as it is in Maine; a federal statute of repose is needed.

V. H.R. 2005 Would Leave No Injured Worker without a Remedy

It cannot be emphasized too strongly that no injured worker would be left without a remedy if H.R. 2005 were to become the law throughout the United States. This is because the statute of repose in H.R. 2005 would apply only to claims for injuries occurring on durable goods where the claimant either has or is eligible to receive workers' compensation payments. Opponents of H.R. 2005 erroneously argue that the bill would return the state of the law back to the 19th Century, by shifting the financial burden of industrial injuries from business to workers. This is simply not the case.

H.R. 2005 will put into place a national statute of repose targeted at a narrow but important range of workplace injury cases. It will not repeal workers' compensation laws across the country. What it will do is greatly reduce the amount of disproportionately expensive and socially unproductive litigation, with little actual reduction in extra benefits to injured workers. It is good public policy based on a common sense understanding of the circumstances and nature of accidents involving overage equipment in the industrial workplace.

Apparently, opponents remain dissatisfied with the rationale for H.R. 2005's targeted statute of repose, criticizing workers' compensation payments as inadequate to make injured workers whole. Regardless of the validity or invalidity of this assessment of workers' compensation payments, it seems irrelevant to our support for H.R. 2005. The trade-off of potentially greater judgments or settlements in tort cases, in exchange for certain compensation for workplace injuries is at the heart of the workers' compensation compact between employers and their employees. Regrettably, manufacturers/suppliers of workplace durable goods are not parties to this compact, but have been added to the compensation equation by expansive judicial theories of liability. Whatever the alleged need for this expansion, it has been done at the expense of adding a potentially ruinous and not-bargained-for burden on industrial machinery manufacturers, in many cases years after their products were initially sold into the stream of commerce.

Opponents of H.R. 2005 have also leveled the charge that the bill would unfairly single out workers and take away rights. They make this assertion by postulating the situation where both a worker and a bystander are injured by the same overage product in the workplace. They correctly judge that under H.R. 2005's statute of repose the injured bystander could sue the product manufacturer, and the management of the workplace we might add although opponents overlook this point, whereas the worker could not, having to settle for a workers' compensation payment. Are the potential awards to these plaintiffs possibly different? Perhaps they are. Is that possible difference unfair or unjust? We think not.

To change the situation a little, even under current law without a statute of repose, in the case of non-product-related injuries suffered by workers and bystanders in the same workplace remedies could be different. Whereas a bystander could possibly receive a settlement or judgment in tort, a worker is again "left with only" a workers' compensation award. Again, there is a difference in outcome, but we do not think it unjustified. Rather than pointing out the legal infirmity of H.R. 2005's statute of repose, these examples serve to once again underscore the basic mutually agreed upon trade-off at the heart of the workers' compensation compact. Employers and their workers are parties to that compact, by standers and manufacturers are not. This is the reason for the bargained-for difference in outcomes in the various situations, not the inequity of the statute of repose.

Finally, opponents of H.R. 2005 criticize the bill in the case of two workers injured by the same product, one before and one after the tolling of the statute of repose, for "unfairly shift[ing] the risk of defective products to workers." But what is fair

about a system that saddles manufacturers with potentially endless liability in the name of rectifying perceived inadequacies in the workers' compensation bargain between employers and employees? And what about non-product-related workplace injuries? Are they inadequately compensated for by workers' compensation as well? If so, what do H.R. 2005's critics suggest in those cases? We are tempted to refer to the old adage that two wrongs don't make a right. Shoring up the alleged weakness in the workers' compensation system by saddling manufacturers/suppliers of workplace durable goods with unfair and not-bargained-for liability is inherently inequitable and ultimately counterproductive to our economy.

VI. Durable Goods Manufactures will Continue to have Legal and Economic Incentives to Produce Safe Products Even Under H.R. 2005's Statute of Repose

Opponents of H.R. 2005 also argue that "by shifting the cost of injury to workers and employers, this bill removes the legal and financial incentive that the manufacturers of durable workplace machinery currently have to ensure that their products remain safe throughout their useful lives." We find this to be a preposterous assertion that overlooks the fact that even under H.R. 2005's statute of repose, manufactures will continue to be fully subject to a finding of liability for injuries incurred on their products for the first 18 years of use in the workplace.

Far from "forcing the workers' compensation system to subsidize the costs that should be charged to the manufacturers of older defective equipment," H.R. 2005 would continue to keep manufacturers in the compensation equation for the first 18 years of their products' useful life. In many cases this will be well beyond a product's economic life, meaning that it will be technologically obsolete well before the expiration of the repose period. Moreover, a usual practice is for the original purchaser to resell the used equipment, without the knowledge of the manufacturer, before the statute or repose is tolled. Therefore, durable good manufacturers will continue to have the same incentives they have under current law to design, build and market safe equipment, knowing that they could be found liable for product defects for 18 years after selling their product into the stream of commerce.

With this potential for liability in mind, what logic would persuade a manufacturer to gamble its company's reputation and financial solvency by not producing a safe product in the first place, with the hope of escaping liability in year 19 of its product's useful life. And even if a product was found to be "defective" in year 19, experience shows that liability should not be measured against the technological advances of the intervening 18 years if a product was state-of-the-art when first put into commerce. Neither should manufacturers be assigned liability stemming from misuse and/or alteration of their products that occurs outside of their control and many years after the original sale.

VII. H.R. 2005 is Good Public Policy and should be Law

H.R. 2005 is a narrow bill that is the result of years of negotiatior and compromise. It attempts to accomplish a small but important purpose. It does not unduly infringe upon states' rights as Congress has full power and authority to regulate interstate commerce. It does not leave injured workers without financial remedy. It does prevent frivolous lawsuits that injure the competitiveness of American printing equipment manufacturers.

H.R. 2005 represents the limit of what can be enacted into law at this time. For this reason we urge you to act now and make it law in the 106th Congress. Such action would not be to "whittle away the ability of injured persons to be fairly compensated." Rather it would be the next incremental step in addressing areas of inequity and inefficiency in the current law, as a consensus for reform is achieved.

NPES thanks the Committee for it interest in this important subject, and we stand ready to respond to inquiries and/or provide additional information.

PREPARED STATEMENT OF THE U.S. CHAMBER OF COMMERCE AND U.S. CHAMBER INSTITUTE FOR LEGAL REFORM

INTRODUCTION

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and professional organizations of every size, sector, and region of the country. The central mission of the Chamber is to represent the interests of its members before Congress, the Administration, the independent agencies of the federal government, and the federal courts. The mission of the Institute for Legal Reform is to reform the nation's state and Federal civil justice systems to make them more predictable, fairer and more efficient while maintaining access to our courts for legitimate lawsuits.

Given the diversity of our membership, the U.S. Chamber of Commerce is well qualified to discuss this important topic. We are particularly cognizant of the problems that small businesses face in abusive class actions because more than 96 percent of our members are small businesses with 100 or fewer employees and 71 percent have 10 or fewer employees. We welcome this opportunity to discuss the critical issue of the class action crisis and the urgent need for prompt action by Congress.

We would like to recognize the tremendous work on class action reform by Chairman Henry Hyde, as well as Representatives Bob Goodlatte, Rick Boucher, Jim Moran and Ed Bryant. We also want to express our appreciation for the leadership and commitment of a broad bipartisan coalition of Representatives and others who are working with the business community to curb class action abuse and promoting H.R. 1875, the Interstate Class Action Jurisdiction Act of 1999. We owe the Judiciary Committee a great debt of gratitude for its efforts to work with us to address the class action problem quickly, fairly and in a bipartisan manner.

THE CLASS ACTION PROBLEM

Class action litigation is a necessary part of our legal system because it can bring efficiency and fairness to situations involving many people with similar claims. Unfortunately, class action cases are becoming much more common and are being used in ways never envisioned or intended. In the recent past, there has been an explosion of class action cases in state courts. In essence, states with lax rules and procedures allow plaintiffs attorneys to "game" the system in large interstate class actions by causing cases to remain in that state's courts rather than being heard in federal court. The result is that a complex, interstate legal dispute is heard in a state court that may not have the resources or expertise to manage appropriately such complex litigation. Even worse is the fact that some state courts are known to be hostile to out-of-state "deep pocket" defendant companies.

For example, as reported in the attached study by Stateside Associates, during 1996 and 1997 one circuit court judge in Alabama certified 35 class action cases. To put that number in perspective, during 1997, all 900 United States federal district court judges certified a combined total of 38 class actions (note—this does not include cases against the government and discrimination class actions). In essence, this single state judge in two years certified one less class action than all 900 federal district court judges certified in one year. This number should be a cause of great concern.

It is important to note that the framers of the Constitution created the concept of diversity jurisdiction to allow large cases with parties from different state to be heard in federal court. This was done to ensure that such cases were decided impartially, rather than allowing the "home field" litigant an unfair advantage. Today's class action system, however, encourages such an unfair advantage. All too often, massive nationwide class actions involving citizens and the laws of all fifty states are heard in one state court. This has resulted in a race to the bottom because of the potential reward for plaintiffs attorneys and the prospect of "bet-the-company" litigation for defendants.

Even if a claim in a class action may be without merit, because the case is brought on behalf of thousands or millions of claimants, a defendant's liability exposure is potentially enormous. The result is that the class counsel can exert tremendous leverage on the defendant and coerce a settlement. These settlements frequently provide little to the class members and much more to the attorneys. A prime example of this is a class action settlement reported in *The Chicago Tribune* where the class attorneys received an $8.5 million payment, but members of the class actually received a $91.13 debit to their mortgage escrow accounts (in other words, the class members actually ended up *owing* money).

The reason abusive class actions such as the one discussed above are allowed to proceed is because many interstate class actions cannot be heard in federal court. Before a class action can be heard in federal court, current law requires either that a federal question exists or that there is complete diversity between the parties. In the vast majority of cases, however, there is no federal question and the defendant's only hope to get into federal court is under the diversity statute. The complete diversity requirement means that all of the plaintiffs must be from different states from all of the defendants and each plaintiff's claim must be worth at least $75,000. Unfortunately, when defendants in a class action try to remove the case to federal court, their attempts often fail because of the complete diversity requirement.

Why is that so? Most removal efforts ultimately fail because of various pleading tricks that the class counsel uses to avoid federal jurisdiction. A good example of this is the way some attorneys plead restrictions on class claims to preclude re-

moval. After it becomes too late to remove the claim, the attorney lifts the restrictions and reveals the true nature of the action.

Another example is "fraudulent joinder." In those cases, class counsel names defendants that are not really the target of the action merely to avoid removal (i.e., these defendants are citizens of the same state as some of the class members). Once it becomes too late to remove the case to federal court, those defendants are dropped from the action. A secondary problem with this technique is that these "extra" defendants still have to spend significant resources to hire legal representation and fight in court. They have no way of knowing whether they are going to be dropped from the case and have to do what they can to defend themselves. If the extra plaintiff happens to be a small business, the thousands of dollars in legal fees and lost time can be catastrophic to the business.

H.R. 1875 IS THE SOLUTION

H.R. 1875 is a narrowly tailored and balanced solution to the class action problem. The legislation does not change the substantive rights of any plaintiff to bring a lawsuit, nor does it prohibit appropriate state court class actions from being heard in a state forum. This legislation simply clarifies that the federal diversity statute no longer requires complete diversity for large, interstate class actions. Instead H.R. 1875 allows a class action to be heard in federal court if there is "minimal diversity" between the parties. In essence, this means that so long as at least one plaintiff has a different state citizenship than at least one of the defendants, then, in most circumstances, the class action can be heard in federal court.

Under three exceptions, the bill specifically allows local and intrastate class actions to remain in state court. First, a federal judge can decline to hear local cases where a "substantial majority" of the class members and defendants are citizens of the same state and the case will be primarily governed by that state's law. Second, federal judges do not have to hear cases involving less than 100 class members or less than $1 million in controversy. Third, when the case is against the state or state officials, the federal judge does not have to hear the case.

The legislation also closes several important loopholes that allowed class counsels to "game" the system. First, unnamed class members are allowed to remove the case to federal court within thirty days after they are formally notified about the class action. Second, any party may remove the case to federal court without seeking the other parties' permission. Third, the one-year limitation on removal will no longer apply to class actions. An exception is that a defendant must remove the case to federal court within thirty days after first becoming aware of federal jurisdiction.

If a case that is removed to federal court under minimal diversity is found to not meet federal class action requirements then the court has discretion to continue exercising jurisdiction over the case or to dismiss it without prejudice. As under current federal law, applicable statutes of limitations on the class members' claims do not run during the time the action was pending in federal court. If the federal judge dismisses or remands the claim, the plaintiffs will be permitted to refile or amend their claims without prejudice but the case could be removed to federal court again, if it is still subject to federal jurisdiction.

CONCLUSION

The Interstate Class Action Jurisdiction Act of 1999 will guarantee that many of the more abusive class actions that are now heard in state courts will be eligible for federal jurisdiction. The bill does not modify any plaintiff's substantive rights and is only procedural in nature. The legislation simply recognizes that certain large, interstate class actions more appropriately belong in federal court rather than state court. The legislation complies with federalism principles in that it seeks to prevent the exact problems recognized by the founders when they decided to provide diversity jurisdiction to the federal courts. H.R. 1875 has broad bipartisan support as well as strong support from the entire business community. Its swift and favorable consideration by this committee as well as the fall House of Representatives and eventual enactment into law is vitally important to America's businesses.

STATESIDE ASSOCIATES

CLASS ACTIONS IN STATE COURTS:

A REPORT ON ALABAMA

February 26, 1998

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CLASS ACTIONS IN STATE COURTS
A CASE STUDY: ALABAMA

Background

In light of reports of a surge of class actions filed in state courts, it was decided late in 1996 to analyze the number and disposition of such cases in selected jurisdictions.

A number of states were surveyed — Alabama, California, Illinois, Tennessee, Texas — to determine the feasibility of undertaking such an analysis. States were chosen on the basis of anecdotal reports of defense lawyers who indicated that an extraordinary number of class actions against out-of-state defendants were being brought in those jurisdictions.

Unfortunately, only one of the states kept its records in a form that made a modest research project feasible: Alabama. Alabama was chosen for study, therefore, not to call attention to one state, but because class actions are easily identifiable in its very accessible courthouse records. *This report is about state class action filings, not about Alabama.* Alabama is a useful example of a broader phenomenon now occurring in jurisdictions nationwide.

At various times between December 1996 and February 1998, trial court records were searched in six of Alabama's 55 counties: Choctaw, Fayette, Greene, Macon, Marengo, and Sumter. They were selected on the advice of Alabama defense counsel. Three of them, Greene, Marengo and Sumter, constitute the 7th Judicial Circuit of Alabama, with a single trial judge, the Hon. Eddie Hardaway.

The period researched in Fayette was 1995-96; for all others it was 1995-97. Research in Choctaw, Macon and Marengo concluded late in 4th quarter 1997 and may not reflect the entire year. Information produced by this project is reasonably complete but there were a fair number of missing and incomplete files in all counties. *Numbers of class actions and class certifications are almost certainly understated.*

Most of the actions filed in this 1995-97 period were still pending at the time courthouse records were reviewed. Most were still in an early pleading stage. Information about them is current only as of that date. There has been no attempt made to give a complete history of the cases cited.

Principal findings

- A total of 91 putative class actions were found to have been filed in these six rural Alabama counties in the period covered.

- In slightly more than half of these cases, no action had been taken by the trial court on class certification issues at the time of our review either

because the plaintiffs had not moved for class certification or because the matter had been removed to federal court.

- In cases in which the court had ruled on class certification, the motion for class treatment was invariably granted. Classes were certified in 43 cases.[1] And in at least 38 cases, a class was certified *ex parte,* without notice or hearing, usually on the date the complaint was filed, even though Alabama has adopted the federal Rule 23 verbatim.

- Classes are often loosely defined, but at least 28 appear on their face to be brought on behalf of a putative nationwide class. Many others probably extend well beyond Alabama since classes are frequently defined by reference to transactions ("everyone who did X with Y") without reference to class members' domiciles.

- Many of the primary defendants in these actions are large national companies.[2] In fact, the most striking finding of this report is the frequency with which class actions are brought against national companies — whether they be nationwide, regional or state classes — in the trial courts of this single state.

- To avoid removal to federal court, complaints against foreign corporations typically include Alabama companies or individual Alabama residents as codefendants, state that no individual class member seeks or will accept damages, including interest, costs and attorney fees, that are not less than the federal amount-in-controversy (now $75,000), claim no punitive damages, and state that there are no federal causes of action.

- Venue is often an issue in these cases since many of them have no connection to the county in which they are brought except that service can be had on the defendants there.

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[1] To put this figure in perspective, all 900 federal District Court judges certified a total of 38 class actions in 1997.

[2] They include, for example, AlliedSignal, American Home Products, Associates Financial Services, AT&T, AVCO, BankOne, Bayer, BellSouth, Carnival Cruise Lines, Chrysler, Citicorp, Commercial Credit Corp., Federal Express, Ford, General Electric, General Motors, General Motors Acceptance Corporation, H&R Block, ITT, Lucent Technologies, Norwest Financial, Prudential Insurance, Quaker State, State Farm, Transamerica, and United Technologies.

I. Choctaw County.

Choctaw County is on the western border of Alabama. Butler is the County seat. Other towns and communities include Bladon Springs and Choctaw. Choctaw County is one of Alabama's largest in area (911 square miles) and smallest in population.

Choctaw is in the First Judicial Circuit made up of Clarke, Choctaw, and Washington counties. Judge J. L. McPherson is the Circuit Judge. He was elected to a six year term in 1994.

A. Summary

There were five class actions filed in Choctaw County in 1995. Two were dismissed without prejudice; two were removed to federal court. Two, including one pending statewide class, were certified *ex parte*.

Three class actions were fled in 1996. All are nationwide classes and all were certified *ex parte*. One class action was brought in 1997. It is a nationwide class and was certified *ex parte*.

B. 1995 class action filings

95-1. Ruffin et al. vs. Transamerica Financial Services, Inc., CV-95-001-P, 1/3/95. Points charged on mortgage loans exceeding statutory limit; fraudulent suppression. Action brought by two named plaintiffs, Alabama residents, against defendant, an Alabama corporation, on behalf of all borrowers from defendant who used property located in Alabama as collateral. Motion to compel arbitration. Dismissed without prejudice, 8/8/97. Plaintiffs represented by Mark Ezell, Ezell & Sharbrough, Mobile.

95-2. Johnson et al. vs. Heilig-Meyers Corp. et al., CV-95-065-M, 6/13/95. Providing consumer loans and insurance without a license. Class action brought by two named Alabama residents on behalf of all Alabama residents who purchased household gods from defendant and were provided consumer credit or insurance. Class certified *ex parte*. David Ezell representing class; Lanny Vines representing intervenors.

95-3. Jones et al. vs. Prudential Insurance Co., et al., CV-95-117, 9/28/95. Fraud and suppression. Action brought by four named Alabama residents on behalf of a national class consisting of all persons who were insured by defendant under a policy of collateral protection insurance. Asserts there are no federal claims, no claim for $50,000 or more, no claim for punitive damages. Notice of removal filed. Dismissed without prejudice. Lanny Vines and Lloyd Gathings, Emond & Vines, Birmingham, and William Utsey, Utsey, Christopher & Newton, Butler, represented plaintiffs.

95-4. Henderson et al. vs. Georgia Pacific, CV-95-140, 12/05/95. Products liability. Class certified ex parte 12/07/95. Transferred 1/09/96. No file.

95.5 Foster et al. vs. ABT Co. et al., CV-95-151, 12/21/95. Class action. No action on certification motion. Case transferred. No file. Plaintiffs represented by Joseph C. Sullivan,

Mobile.

C. 1996 class action filings

96-1. Moon et al. vs. Ford Motor Co., CV-96-029, 02/08/96. Fraud, product liability, breach of warranty. Action brought by two named Alabama representatives against purchasers of 26 million Ford vehicles with an allegedly defective ignition switch. No punitive damages are claimed; since switch costs $75, no class member has suffered $50,000 in damages. Class certified *ex parte* 2/16/96. Notice of removal. Plaintiffs represented by Mark Ezell, Mobile, and David Guin, Birmingham, and Arkansas, California, New York and Pennsylvania "Of Counsel."

96-2. Jackson et al. vs. Trustmark National Bank, Prudential Property and Casualty Co., and Central National Insurance Co., CV-96-049, 4/25/96. Breach of contract, fraud, conspiracy. Action brought by three named Mississippi residents against defendant Alabama, Illinois and New Jersey corporations, on behalf of a nationwide class of all persons who had policies of collateral protection insurance with defendants. Compensatory damages of less than $50,000 for each class member. Nationwide class certified *ex parte* 5/08/96. Notice of removal. Plaintiffs represented by Mark Ezell, Butler, and Joe Whatley, Birmingham.

96-3. Gourges et al. vs. Lomas Mortgage USA, Inc., et al., CV-96-062, 05/30/96. Breach of contract, unjust enrichment. Action brought against six national mortgage service firms by two named Alabama residents on behalf of all persons who were party to a residential mortgage loan and were charged a fee to release the lien when they paid off the mortgage. Nationwide class certified *ex parte* 6/07/96. Motions to sever and remove. Plaintiffs represented by Mark Ezell, Butler, Richard Freese, Birmingham, and Joe Whatley, Birmingham.

D. 1997 class action filings

97-1. Mosley et al. vs. A.H. Robbins Co., et al., CV-97-014, 09/26/97. Product liability, breach of warranty. Action brought by two named Alabama residents A.H. Robbins and various Alabama distributors and retailers, on behalf of a class of all Alabama residents who purchased and used "Fen-fan" (sic). Class certified *ex parte* 09/26/97. Plaintiffs represented by John Utsey, Butler, Lloyd Gathings, Birmingham.

II. Fayette County.

Fayette County, Alabama, northwest of Birmingham near the Mississippi border, has a population of 18,081. Fayette is the county seat.

The 24th Judicial Circuit of Alabama comprises Fayette, Lamar and Pickens Counties. James Moore is the Circuit Judge. Judge Moore was appointed to the bench in December 1993 to fill the unexpired term of Judge Clatus Junkin, who had resigned to open a Fayette office of the Jasper, Alabama, law firm of King & Ivey. He was elected to a full term in 1994.

A. Summary

In 1995, 132 civil actions were filed in Fayette County. Seven of these were putative class actions. King & Ivey (Garve Ivey, Jr., and Clatus Junkin) represent the plaintiffs in all seven cases. One class was certified after notice and hearing; one settlement class was certified.

In 1996, 162 civil actions were filed of which six were putative class actions. The file of a seventh case, CV-96-107, which is believed to be a class action, has not been located. As of the date the files were searched, classes had not been certified in any of these actions.

B. 1995 class action filings

95-1. Woodley et al. vs. Protective Life Insurance, CV-95-005, 01/13/95. Fraud. Two named plaintiffs, a husband and wife, residents of Alabama, on behalf of a nationwide class of all persons who bought credit life insurance from defendant. Complaint states, "This action is brought pursuant to the common law and statutory law of the State of Alabama. No claim is made under any federal statute or for any federal cause of action. No class member has or claims compensatory or punitive damages that equal or exceed $50,000. Each and every class member expressly waives any and all claims to and will not accept damages of whatsoever kind in excess of $50,000." Court's order of 05/10/95 certifies a settlement class of all living Alabama residents who purchased credit life insurance from defendant during the 20 year period prior to commencement of the action, approves a settlement, and awards fees of $5 million to class counsel. Plaintiffs represented by Garve Ivey, Jr., and Clatus Junkin.

95-2. Cooley vs. Life of the South Insurance Co., CV-95-024, 03/16/95. Fraud. Named plaintiff, an Alabama resident, on behalf of all persons who bought credit life insurance from defendant. Language quoted above from the Woodley complaint is repeated. Latest entry is 05/02/95 notice of filing of motion for removal to Northern District of Alabama. Plaintiffs represented by Garve Ivey, Jr., and Clatus Junkin.

95-3. Galloway vs. U.S. Life Credit Life Insurance Co. , CV-95-025, 03/16/95. Fraud. Named plaintiff, an Alabama resident, on behalf of all persons who bought credit life insurance from defendant. Language quoted above from the Woodley complaint is repeated. On 01/07/97, after hearing, order entered certifying a class of all living Alabama residents who purchased credit life insurance from defendant with specified terms and conditions during the 20-year period prior to commencement of the action. Plaintiffs represented by Garve Ivey, Jr., and Clatus Junkin.

95-4. Bush vs. Mountain Life Insurance Co. , CV-95-029, 03/30/95. Fraud. Named plaintiff, an Alabama resident, on behalf of a class of all persons who bought credit life insurance from defendant. Language quoted above from the Woodley complaint is repeated. No certification motion or order. Plaintiffs represented by Garve Ivey, Jr., and Clatus Junkin.

95-5. Kazzire vs. Andrew Bynum Oldsmobile and General Motors Corporation, CV-95-046, 05/03/95. Fraud, breach of contract, breach of warranty (alleged defective paint). Named plaintiff, an Alabama resident, on behalf of a class of all Alabama residents who purchased GMC vehicles from Bynum or others. Complaint amended 05/12/95 to add as defendants all GMC dealers who sold GMC vehicles to Alabama residents during the 20 years prior to commencement of action. Language quoted above from the Woodley complaint is repeated in original and amended complaints. 05/22/95, notice of filing for removal to U.S. District Court for Northern District of

Alabama, Jasper division. Plaintiffs represented by Garve Ivey, Jr., Clatus Junkin and Andrew P. Campbell, Birmingham, Alabama.

95-6. Cooley vs. Norwest Financial Alabama, Inc. et al., CV-95-075, 08/11/95. Fraud. Named plaintiff, an Alabama resident, on behalf of all persons who bought credit life insurance and/or credit disability insurance through defendants. Language quoted above from the Woodley complaint is repeated. No certification motion or order. Plaintiffs represented by Garve Ivey, Jr., and Clatus Junkin.

95-7. Dover vs. Standard Furniture Co. of Fayette et al., CV-95-081, 08/29/95. Fraud. Named plaintiff, an Alabama resident, on behalf of a class of all persons who bought credit life insurance or property insurance in an amount less than $300 from any defendant. Language quoted from the Woodley complaint is repeated. Motion for class certification filed 08/29/95. No certification order. Plaintiffs represented by Garve Ivey, Jr., and Clatus Junkin.

C. 1996 class action filings

96-1. Brown vs. Professional Educators Group and Independent Life Insurance Co. 012/23/96. Fraud. Named plaintiff, an Alabama resident, on behalf of a class of all persons who bought credit life insurance from defendant. Language quoted above from the Woodley complaint is repeated. No certification motion or order. Removal petition filed 02/28/96; papers returned 03/12/96. Plaintiffs represented by Garve Ivey, Jr., and Clatus Junkin.

96-2. Gray vs. Life of the South Insurance Co. 01/24/96. Plaintiffs represented by Garve Ivey, Jr. Judge Moore had file. Could not get access to it. Class action brought by Garve Ivey for fraud in sale of credit life insurance apparently dismissed on notice of approval of class certification and settlement ir McMahon vs. Life of the South Insurance Co., CV 95-PT-3373-E, in the Northern District of Alabama, Jasper Division.

96-3. Taylor vs. Edwards Chevrolet Co., General Motors Acceptance Corp. and MIC Property & Casualty Insurance Co., 0/19/96. Fraud. Named plaintiff, an Alabama resident, on behalf of a class of all customers of GMAC who have been insured by and through MIC. Complaint states: "Notwithstanding any previous allegation or interpretation thereof in this complaint, this action is brought pursuant to the common law and statutory law of Alabama. No claim is made under any federal statute or for any federal cause of action." Plaintiff represented by King, Ivey & Junkin and David Cromwell Johnson, Birmingham, Alabama.

96-4. Roney vs. Commercial Credit Corp. and American Bankers Insurance Co. , CV-96-016, 01/25/96. Fraud. Named plaintiff, an Alabama resident, on behalf of a class of all customers of Commercial Credit who have been insured by and through American Bankers. Complaint states: "Notwithstanding any previous allegation or interpretation thereof in this complaint, this action is brought pursuant to the common law and statutory law of Alabama. No claim is made under any federal statute or for any federal cause of action. No single class member has or claims compensatory or punitive damages that equal or exceed $50,000.". 05/01/96, removed to U.S. District Court for Northern District of Alabama, Jasper Division. Plaintiffs represented by Garve Ivey, Jr., and Clatus Junkin.

96-5. Sanford vs. American General Finance Inc. , CV-96-070, 06/06/96. Fraud. Named plaintiff, an Alabama resident, on behalf of a class of all persons who have had installment contracts with defendant upon which credit life and/or term life insurance were written. Motion for class certification, 06/06/96. Ruling on certification motion deferred until completion of discovery, 09/09/96. Plaintiffs represented by Garve Ivey, Jr., and Clatus Junkin.

96-6. Jackson vs. Concept Cable Systems, Inc., American General Finance, et al., CV-96-11, 09/13/96. Fraud. Named plaintiff, an Alabama resident, on behalf of a class of all Alabama residents who have bought satellite receiver systems from defendant. 11/07/96, motion to dismiss Concept granted. 02/07/97, motion for certification of a class of "all persons that have entered into transactions at any time in the state of Alabama for purchase of a satellite system that has been financed by American General Finance (or one of its affiliated companies) by issuance of a charge or credit card." Plaintiffs represented by William H. Atkinson, Winfield, Alabama, and Andrew P. Campbell, Birmingham, Alabama.

III. Greene County

Greene County, Alabama, 90 miles southwest of Birmingham, near the Mississippi border, has a population of 10,210. It is the poorest county in Alabama. Eutaw, population 3,000, is the county seat.

The Seventh Judicial Circuit of Alabama comprises Greene, Sumter and Marengo Counties. Judge Eddie Hardaway, who lives and works in Sumter County, is the Circuit's only judge. Judge Hardaway was elected to the Circuit Court in 1994, a year after his graduation from the University of Alabama School of Law.

A. Summary

In 1995, 112 civil actions were filed in Greene County, of which only three were class actions. There are no class certification motions or orders in these three cases.

In 1996, 175 civil actions, were filed, of which at least 16 are class actions; in 1997, 165 civil actions were filed, of which 10 were class actions.

- In 18 of these 26 putative class actions, Judge Hardaway certified the class *ex parte* upon or soon after the filing of the complaint. In one other case, a class was certified after hearing.

- In 12 cases, Judge Hardaway certified a nationwide class.

- In at least 14 of the 26 putative class actions, plaintiffs are represented by J. L. Chesnut, Jr., of Selma, Alabama, often with out-of-state co-counsel.

B. 1995 class action filings

95-1. Underwood et al vs. BellSouth Mobility Inc. and CelluLink, Inc., CV-95-014, 03/03/95.

Illegal penalty, unjust enrichment. Seven named plaintiffs, all Alabama residents, on behalf of a class of all U.S. citizens who have contracted with defendants for cellular telephone services. File contains no motion for or order of class certification. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL and T. Roe Frazer II, Jackson, MS.

95-2. Plowman et al. vs. Bedford Financial Corp. et al., CV-95-050, 09/07/95. Fraud. Five named plaintiffs, all Alabama residents, on behalf of a class of persons who received consumer financing of mobile homes through or from defendants. File contains no motion for or order of class certification. Plaintiffs represented by Crownover, Coleman & Standridge, Tuscaloosa, AL, and Turner & Turner, Tuscaloosa, AL.

95-3. Edward et al. vs. Citicorp National Services at al., CV-95-059, 07/14/95. Two named defendants, both Alabama residents, on behalf of a class of all persons who purchased collateral protection insurance in connection with the financing of mobile homes by defendants. File contains no motion for or order of class certification. Plaintiffs represented by Crownover, Coleman & Standridge, Tuscaloosa, AL, and Turner & Turner, Tuscaloosa, AL.

C. 1996 class action filings

96-1. Cain et al vs. US HealthTrust, CV-96-027, 01/28/96. Four named defendants, residents of California, Mississippi and Texas, suing on behalf of all shareholders of EPIC Holdings, Inc., a company acquired by defendant. File contains no motion for or order of class certification. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL and T. Roe Frazer II, Jackson, MS.

96-2. Bell et al vs. State Mutual Insurance Co. et al., CV-96-040, 02/21/96. Fraud. Seven named plaintiffs, Alabama residents, on behalf of all purchasers of policies from defendant with "vanishing premium dividend option." Nationwide class certified 02/21/96 after hearing. Plaintiffs represented by Pritchard, McCall & Jones, Birmingham, AL.

96-3. Carpenter et al vs. State Farm Insurance et al., CV-96-057, 04/12/96. Fraud. Six named plaintiffs, residents of DeKalb, Greene, Jackson, Jefferson and Tuscaloosa Counties, Alabama, suing on behalf of all Alabama residents who have purchased homeowners' insurance from the defendant since 1986 and have their homes appraised for that purpose by the defendant. Class certified *ex parte* by Judge Hardaway, 04/19/96. Case transferred, 05/24/96. Plaintiffs represented by R. Jackson Drake, Birmingham, Joe R. Whatley, Jr., Birmingham, Herman A Watson, Jr., Huntsville, Larry W Morris and Kenneth F. Ingram, Jr., Alexander City.

96-4. Brown vs. Alfa Mut. Ins. Co., CV-96-061, 04/19/96. Named plaintiffs, both Alabama residents, suing on behalf of a class of all Alabama residents who presently insure there homes through a policy issued by defendant and all Alabama residents who at any time in prior six years maintained a homeowners insurance policy issued by defendant. Class certified *ex parte* by Judge Hardaway 04/19/96.

96-5. Faniel vs. Associates Financial Services Co. of Alabama, CV-96-069, 05/08/96. The named plaintiff, an Alabama resident, suing on behalf of a class of all Alabama residents who had loans refinanced or consolidated by defendant. Class certified *ex parte* by Judge Eddie Hardaway, 08/12/96. Plaintiffs represented by J .L. Chesnut, Jr., Selma, Robert G. Methvin, Jr.,

Birmingham, and Andrew P. Campbell, Birmingham.

96-6. Cook et al vs. Ford Motor Co. and United Technologies Corp., CV-96-090, 06/17/96. Negligence, breach of warranty, conspiracy. Four named plaintiffs, residents of Alabama, Illinois, Iowa and Michigan, suing on behalf of a nationwide class of owners of Ford vehicles with UT ignitions. Nationwide class certified *ex parte* by Judge Hardaway, 06/26/96. Case transferred, 08/08/96. Plaintiffs represented by J. L. Chesnut, Jr., Selma, John M. Deakle, Hattiesburg, MS, Joseph W. Phebus, Urbana, IL, Carey & Daniels, St. Louis, MO, and D. Michael Campbell, Miami, FL.

96-7. Young et al, vs. Prudential Insurance Co., CV-96-108, 07/30/96. Breach of fiduciary duty, breach of contract. Four named plaintiffs, residents of Dallas County, AL, Green County, AL, Vineland, NJ and St. Louis, NJ, suing on behalf of a class of all individuals insured by the defendant under Medicare supplement insurance plan since 01/091/91. Nationwide class certified *ex parte* by Judge Hardaway, 08/16/96. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL, Joseph W. Phebus and Nancy Glidden, Urbana, IL, Carey & Daniels, St. Louis, Mo., John Michael Sims, Heidelberg, MS, David Danis, St. Louis, MO, D. Michael Campbell, Miami, FL.

96-8. Greene County Newspaper Co. vs. Federal Express et al., CV-96-117, 08/16/96. Breach of contract, fraud. Three named plaintiffs, Alabama, Illinois and Missouri companies, representing a class of all FedEx customers who shipped goods for a price in which the federal air transportation tax was included after 12/31/96. Nationwide class certified *ex parte* by Judge Hardaway, 08/16/96. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL, Carey & Danis, St. Louis, MO, Joseph W. Phebus, Urbana, IL., and John M. Deakle, Hattiesburg, MS.

96-9. Crawford et al vs. Combined Insurance Co. et al., CV-96-132, 09/20/96. Fraud. Four named plaintiffs, residents of Greene and Tuscaloosa Counties, on behalf of a nationwide class consisting of all purchasers of specified health and accident insurance plans from defendant, an Alabama corporation. Nationwide class certified *ex parte* by Judge Hardaway. 09/20/96. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL and Ronald O. Gaiser, Jr., Birmingham, AL.

96-10. Steele et al vs. Prudential Insurance Co., CV-96-134, 09/25/96. Fraud. Ten named plaintiffs, residents of Alabama, Illinois and New Jersey, on behalf of all U.S. residents who purchased life insurance policies from defendant between 1985 and 1994 and were victims of an "illegal churning scheme." Nationwide class certified *ex parte* by Judge Hardaway, 09/25/96. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL, Joseph W. Phebus, Urbana, IL and John M. Deakle, Jr., Hattiesburg, MS.

96-11. Ash vs. Wyeth Laboratories and American Home Products, CV-96-135, 09/26/96. File unavailable. Appears to be a Norplant class action. Plaintiffs represented by Jonathan H. Waller.

96-12. Jackson vs. Franklin Life Insurance Co., CV-96-139, 10/02/96. Fraud. Two named plaintiffs, residents of Greene County, representing a class of all persons who purchased insurance policies from defendant, an Illinois company, based on certain misrepresentations. Nationwide class certified *ex parte* by Judge Hardaway, 01/10/96. Plaintiffs represented by J. L. Chesnut, Jr.,

Selma, AL and Ronald O. Gaiser, Jr., Birmingham, AL.

96-13 Smith et al vs. Durakon Industries et al., CV-96-156, 11/07/96. Fraud, negligence, breach of warranty. Fifteen named plaintiffs, residents of Alabama, Florida, Illinois, Michigan and Wisconsin on behalf of a class of all U.S. individuals and entities who are owners of truck "bedliners" manufactured by defendants, five corporations located in Florida, Illinois, Michigan and Wisconsin. Nationwide class certified *ex parte* by Judge Hardaway, 11/07/96. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL and D. Michael Campbell, Miami, FL.

96-14 Walters et al vs. Lincoln Nat'l Life Insurance Com., CV-96-157, 11/12/96. Fraud. Two named plaintiffs, Alabama residents, on behalf of a class of all Alabama residents who are or were members of Locals 351 and 753 of United Steel Workers Union and purchased life insurance from defendant, a foreign corporation. Motion for *ex parte* class certification filed 11/12/96 but no certification order in file. Notice of removal, 12/12/96. Plaintiffs represented by Andrew P. Campbell, and Charles McCallum, II, Birmingham, AL, H. Jerome Thompson, Moulton, AL and J. L. Chesnut, Jr., Selma, AL.

96-15. Davis et al vs. Quaker State Corp. et al, CV-96-162, 11/18/96. Fraud, breach of warranty, violation of Texas Deceptive Trade Practices Act. Two named plaintiffs, residents of Alabama and Illinois, on behalf of a class of all purchasers of Slick 50 Advanced Formula Engine Treatment manufactured or sold by defendants. Nationwide class certified *ex parte* by Judge Hardaway, 11/18/96. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL, Joseph W. Phebus, Urbana, IL, D. Michael Campbell, Miami, FL, John M. Deakle, Hattiesburg, MS, John Michael Sims, Heidelberg, MS, John Carey and Joseph Danis and David Danis, St. Louis, MO.

96-16. Jackson et al vs. Lucent Technologies and AT&T, CV-96-163, 11/18/96. Fraud. Five named plaintiffs, residents of Greene and Hale Counties, Alabama, on behalf of a class of all persons who leased or rented telephone equipment from defendants, foreign corporations headquartered in New Jersey. Nationwide class certified *ex parte* by Judge Hardaway, 11/18/96. Case transferred 12/12/96. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL and John M. Sims, Heidelberg, MS.

D. 1997 class action filings

97-1. Williams et al. vs. America OnLine, CV-97-9, 1/24/97. Breach of contract, negligence, fraud, suppression, unjust enrichment. Action brought by named Alabama residents on behalf of a class of all U.S. residents who were denied or delayed in receiving access promised by AOL, or who were negatively opted-into higher priced services by AOL, or who were charged by AOL for supposedly free services. Class conditionally certified *ex parte* 1/28/97. Petition for writ of Mandamus and/or Writ of Prohibition, 4/24/97. Order of Supreme Court of Alabama staying proceedings in the trial court, 4/25/97. Plaintiffs' motion to dismiss with prejudice in order that plaintiffs might "pursue their remedies in the courts of Illinois where a certified class and a proposed settlement in similar litigation are pending," 6/4/97. Order dismissing with prejudice, 7/9/97. Plaintiffs represented by J.L. Chesnut, Jr., and Henry Sanders, Selma, AL.

97-2. Wesley et al. vs. Colonial Pipeline Co., CV-97-13, 2/7/97. Negligence, wanton and intentional misconduct, nuisance, strict liability. Action brought by named plaintiffs, residents of Alabama and Georgia, on behalf of all persons owning property adjacent to defendant's allegedly unsafe pipeline, running 5,270 miles from Pasadena, Texas, to Linden, New Jersey. Class conditionally certified *ex parte*, 2/7/97. Plaintiffs represented by Donald V. Watkins, Birmingham, AL., Joe R. Whatley, Jr., Birmingham, AL, Mitchell A. Toups, Beaumont, TX, Dennis C. Reich, Houston, TX, Timothy J. Crowley, Houston, TX.

97-3. Means vs. Gerber Products Co., CV-97-58, 3/27/97. Breach of implied warranty, wilful misrepresentation, deceit, breach of contract, negligence, unjust enrichment, No class member seeks more than $74,500 in damages, including attorneys' fees and costs. Action brought by named plaintiff, an Alabama resident, on behalf of all U.S. persons who purchased Gerber baby food products from January 1988 to the present. (Complaint cites and relies upon a 3/211/97 consent decree entered into between Gerber and the Federal Trade Commission.) No equitable relief or punitive damages are claimed. Class conditionally certified *ex parte*, 3/27/97. Plaintiffs represented by Frederick T. Kuykendall, III, Joe R. Whatley, Jr., and Russell Jackson Drake, Birmingham, AL, and Roger W. Kirby and Peter S. Linden, New York, NY.

97-4. Smith et al. vs. Knoll Pharmaceutical, CV-97-70, 4/18/97. Unjust enrichment, suppression. Action brought by named plaintiffs, residents of Alabama, New Hampshire and New Jersey, against defendant New Jersey corporation on behalf of a nationwide class of all persons who, since 1/1/90, have purchased defendant's thyroid medication Synthroid, which defendant is alleged to have misrepresented as being superior to generic forms of thyroxine. No federal causes of action are asserted. Class conditionally certified *ex parte*, 4/18/97. Amended complaint, 4/24/97. Nunc pro tunc order reinstating conditional certification, 6/4/97. Plaintiffs represented by Frederick T. Kuykendall, III, Joe R. Whatley, Jr., and Russell Jackson Drake, Birmingham, AL.

97-5. City of Birmingham and the Greene County Racing Commission vs. The American Tobacco Co. et al., CV-97-81, 5/28/97. Restitution, indemnity, nuisance. An action brought by the named plaintiffs, a municipal corporation and an Alabama state agency, on behalf of a class of all entities and individuals who have paid for treatment or purchased benefits in connection with illness or death caused by smoking. Notice of removal, 6/13/97. Plaintiffs represented by J.L. Chesnut, Jr., Selma, AL.

97-6. Smith vs. Plantation Pipeline Co., CV-97-83, 5/29/97. Breach of contract, negligence, nuisance, strict liability, trespass. Action brought by named plaintiff, an Alabama resident, on behalf of a class of all persons owning property with easements granted to defendant for use of its allegedly hazardous petroleum pipeline, which runs, with "main" and "trunk" lines, from Baton Rouge, LA to a Virginia location near Washington, DC. Motion for conditional certification filed 5/29/97. Notice of removal filed 7/1/97 on grounds of diversity jurisdiction and federal preemption (Hazardous Liquid Pipeline Safety Act). Plaintiffs represented by Frederick T. Kuykendall, III, Birmingham, AL, Mitchell A. Toups, Beaumont, TX, Dennis C. Reich, Houston, TX, and Timothy J. Crowley, Houston, TX.

97-7. French vs. Hurley State Bank, CV-97-85, 6/9/97. Fraud. Action brought by named Alabama resident against defendant South Dakota corporation on behalf of a class consisting of all

persons who have purchased satellite TV systems in Alabama that were financed by defendant. No federal cause of actions are asserted; complaint states that no class member seeks an amount exceeding $74,900; the prayer for relief, however, includes a claim for punitive damages in an unspecified amount. No motion for class certification appears on the record. Notice of removal, 6/30/97, on diversity grounds. Plaintiffs represented by Dennis G. Pantazis, Brian C. Clark, Archie C. Lamb, Jr., and Elizabeth J. Hubertz, Birmingham, AL.

97-8. Walton vs. Independent Fire Insurance Co. et al., CV-97-96, 7/30/97. Theft by deception, unjust enrichment . Action brought by named Alabama resident on behalf of a class of Alabama residents who purchased fire insurance policies from defendant with attached endorsements misrepresenting changes in benefits. .Class conditionally certified *ex parte* 8/1/97. Plaintiffs represented by Thomas E. Dutton, Kenneth W. Hooks and Chris T. Hellums, Birmingham, AL and Jefferson T. Utsey, Butler, AL.

97.9 Charleston vs. Jim Burke Automotive and AmSouth Bank, CV-97-124, 10/1/97. Fraud. Class conditionally certified *ex parte* 10/27/97. Plaintiffs represented by Garve Ivey, Jr., Jasper, AL and Thomas J. Methvin, Montgomery, AL. Action brought by named Alabama resident against defendant Alabama corporation on behalf of a class of all persons who have entered into installment contracts with defendants on which credit insurance was included. Class conditionally certified *ex parte* 10/27/97. Plaintiffs represented by Garve Ivey, Jr., Jasper, AL.

97-10. Gilmore et al. vs. Associates Financial Services Co., CV-97-158, 12/15/97. Fraud, "flipping." Action brought by named plaintiffs, Alabama residents, on behalf of a class of all Alabama residents who entered into loans with defendant and subsequently had loans refinanced or consolidated by defendant. Motion for conditional class certification, undated. Plaintiffs represented by Robert G. Metvin, Jr., Birmingham, AL, Philip W. McCallum, Birmingham, AL, and Byron T. Ford, Eutaw, AL.

IV. Macon County

Macon County is located in the east-central portion of the state. Tuskegee is the county seat. Other towns include Shorter, Franklin, and Notasulga. The population of Macon County is 24,027.

Macon County is in the 5th Judicial Circuit. There are three judges presiding over the circuit. Judge Lewis H. Hamner, Jr., was elected in 1992 and is up for election next year. Judge Howard Bryan IV was elected in 1994. Judge Philip Segrest was elected in November 1994.

A. Summary

Of 263 civil actions filed in 1995, none were class actions. Of 286 civil actions filed in 1996, none were class actions. Of 297 civil actions filed in 1997 (through 12/2), one was a class action.

B. 1997 Class Action

97-1 Perry vs. PrePaid Legal Casualty, Inc., CV-97-280, 10/10/97. Fraud. Action brought by named Alabama resident on behalf of class of all Alabama residents who purchased a pre-paid legal

plan from defendant. No claim said to exceed $74,500. Class conditionally certified *ex parte* by Judge Bryan on 10/10. Plaintiffs represented by James E. Bridges, Auburn, Walter McGowan, Tuskegee, and Jock Smith, Tuskegee.

V. Marengo County

Marengo County is in the western portion of Alabama. Linden is the county seat. Other towns and communities include Demopolis, Myrtlewood and Sweet Water. The county's 1995 population was 23,602. Per capita income is 46th of 55 Alabama counties. The 1994 unemployment rate was 9.1%.

Marengo County is a part of the 7th Judicial Circuit of Alabama. The Circuit Judge is Eddie Hardaway.

A. Summary

In 1995, 183 civil actions were filed in Marengo County. None of these were class actions.

In 1996, 197 civil actions were filed, of which seven were class actions. In 1997, 201 civil actions were filed, of which nine were class actions. Four of these 16 putative class actions were certified, all conditionally and *ex parte*. There were no certification hearings and no other certification orders as of the date of file review.

B. 1996 class action filings

96-1. Taylor vs. GMAC and Baugh Chev-Olds, Inc., CV-96-013, 01/30/96. Fraud, conspiracy. Action brought by named Alabama resident on behalf of a class of all persons who have entered into installment contracts with Baugh that were financed by GMAC. No certification request. Plaintiff represented by Garve Ivey, who withdrew on 07/18/96 and was replaced by Andrew Campbell and Charles McCallum..

96-2. Cosby et al. vs. Household Retail Services et al., CV-96-118, 07/23/96. Fraud, suppression, deceit, breach of contract, conspiracy. Action brought by named Alabama resident on behalf of all persons who have entered into transactions in Alabama to purchase a satellite system financed by HRS. Class certified *ex parte* 08/02/96. Plaintiffs represented by J.L. Chestnut, Jr. , Selma, and Charles A. McCallum, III, Birmingham.

96-3. Finklea vs. BankOne, Dayton, N.A., et al., CV 96-122, 07/24/96. Fraud, suppression, conspiracy. Action brought by two named Alabama residents on behalf of all Alabama residents who purchased satellite systems financed by BankOne. Asserts no federal cause of action and makes no individual claim exceeding $49,000 including interest and court costs. Class certified *ex parte* 08/02/96. Class settlement approved 05/28/97. Attorneys for plaintiffs Andrew Campbell and Charles McCallum, Birmingham.

96-4. Smith vs. Norwest Financial Alabama, CV-96-143, 09/16/96. "Flipping," Fraud,

MiniCode violation. Action brought by named Alabama resident against Alabama corporation on behalf of a class of all Alabama residents who entered into loans with defendant which were subsequently refinanced or consolidated. No order on record certifying class. Individual claim settled. Case dismissed. Plaintiffs represented by Robert G. Metvin, Jr., Birmingham, Andrew P. Campbell, Birmingham, and J.L. Chesnut, Jr., Selma..

96-5. Ramsey vs First Family Financial Services, CV-96-144, 09/16/96. "Flipping," Fraud, MiniCode violation. Action brought by named Alabama residents against Alabama corporation on behalf of a class of all Alabama residents who entered into loans with defendant which were subsequently refinanced or consolidated. No order on record certifying class. Motion to transfer venue denied. Petition for writ of mandamus filed with Supreme Court. Plaintiffs represented by Robert G. Metvin, Jr., Birmingham, Andrew P. Campbell, Birmingham, and J.L. Chesnut, Jr., Selma.

96-6. Winston vs. Robertson Banking Co. et al., CV-96-149. MiniCode violation, fraud, breach of contract. Action brought by named Alabama resident on behalf of all persons who bought credit life insurance from defendants and were unlawfully charged premiums. No record of class certification. Plaintiff's counsel: David Petway, Birmingham, Andrew Campbell, Birmingham, Charles McCallum, Birmingham.

96-7. Johnson vs. Beneficial Nat'l Bank and Southeast Cable Systems, CV-96-152, 10/09/96. Fraud, suppression, conspiracy. Action brought by named Alabama resident on behalf of all Alabama residents who purchased satellite systems financed by BNB. Asserts no federal cause of action and makes no individual claim exceeding $49,000 including interest and court costs. No class certification. Case removed and then remanded. Attorneys for plaintiffs Andrew Campbell and Charles McCallum, Birmingham, J.L. Chesnut, Jr., Selma.

C. 1997 class action filings

97-1. Bridges vs. Commercial Credit Corp., Commercial Credit Corp. of Alabama, CV-97-008, 01/23/97. "Flipping"; fraud. Action brought by named Alabama resident on behalf of a class of all Alabama residents who entered into loans with defendants that were subsequently refinanced or consolidated and all Alabama residents who were sold property insurance by defendants with payments based on total payments of principal and interest. No federal claims; no individual claim exceeding $49,000. Motion for conditional class certification. Motions to transfer venue and to compel arbitration. Plaintiffs represented by Robert G. Methvin, Jr., Birmingham, Andrew P. Campbell, Birmingham, and J.L. Chesnut, Jr., Selma.

97-2. Pope et al. vs. Lynn Goldman, Asa Goldman, Demopolis CATV Co., CV-97-052, 03/26/97. Sexual harassment; intentional infliction of emotional distress. Action brought by named Alabama residents on behalf of a class of all those who have been similarly mistreated by defendant. No class certification request. Plaintiffs represented by John A. Bivens, Tuscaloosa.

97-3. Thompson vs. Frontier Corp. et al., CV-97-066, 04/10/97. Fraud and suppression. Action by named Alabama resident against foreign corporations on behalf of a nationwide class of all persons who have been charged for "inside wire maintenance" without affirmative consent. No

relief sought under federal law; no individual claim exceeds $10,000. Class certified *ex parte* 04/10/97. Petition for Writ of Mandamus to Court of Civil Appeals denied. Petition for Writ of Mandamus to Alabama Supreme Court filed 08/97. Plaintiffs represented by Mark Edzell, Butler, and T. Roe Frazer II, Jackson, Mississippi.

97-4. Johnson vs. ALFA Life Insurance Co., CV-97-68, 04/16/97. Fraud. Action brought by named Alabama residents on behalf of all Alabama residents who purchased "vanishing premium" life insurance policies from defendant ALFA, a domestic corporation. Motions for conditional class certification filed 04/16/97 and 08/04/97. Motion to transfer venue to Wilcox County. Plaintiffs represented by Robert G. Methvin, Jr., Birmingham, J.L. Chesnut, Jr., Selma, and Andrew P. Campbell and Charles A. McCallum, III, Birmingham.

97-5. Bridges vs. State Farm Life Insurance Co. and Kris Mullins, CV-97-106, 06/11/97. Fraud. Action brought by named Alabama resident on behalf of all Alabama residents who purchased "vanishing premium" life insurance policies from defendant State Farm. No federal causes of action; no individual claims exceeding $74,000. Removed and remanded (fraudulent joinder issue). Plaintiffs represented by Phillip McCallum and Robert G. Methvin, Jr., McCallum & Associates, Birmingham.

97-6. Johnson vs. Beneficial National Bank, Southeast Cable Systems, et al., CV-97-120, 07/11/97. Fraud, suppression, conspiracy, etc. Action brought by named Alabama resident against foreign lender and Alabama satellite system installers on behalf of all Alabama residents who purchased satellite television systems that were financed by BNB. Class certified *ex parte* 08/15/97. Settlement stipulation filed 08/15/97 and finally approved 11/17/97. Plaintiffs represented by Andrew Campbell, Birmingham, Charles A. McCallum, III, Birmingham, J.L. Chesnut, Jr., Selma.

97-7. Fluker vs. H&R Block Tax Services, Inc. et al., CV-97-149, 09/02/97. Fraud, suppression, breach of fiduciary relationship, unjust enrichment, conspiracy. Action brought by named Alabama resident against H&R Block and named H&R Block Alabama-resident tax preparers on behalf of a class consisting of all persons who have filed an electronic tax return prepared by H&R Block in connection with which H&R Block advanced funds to be paid from an income tax refund. Nationwide class certified *ex parte* 09/02/97. Removal notice filed 10/03/97, raising issue of fraudulent joinder. Plaintiffs represented by Garve Ivey, Jasper, and Jeff Utsey, Butler.

97-8. Bates vs. C&J Manufactured Homes et al., CV-97-176, 10/145/97. Fraud, suppression. Action brought by named Alabama residents against Alabama and foreign corporate defendants on behalf of a class all persons who have had an installment note or security agreement with C&J including credit life insurance. No class certification. Motions to transfer venue filed. Plaintiffs represented by Garve Ivey, Jasper.

97-9. Salmon vs. Heilig Meyers, Inc. et al., CV-97-192, 11/13/97. Fraud, breach of contract. Action brought by named Alabama residents on behalf of all those who have been assessed credit life insurance premiums by defendant based on total payments rather than unpaid balance. No class certified as of date of search. Attorneys for plaintiffs Andrew Campbell and Charles

McCallum, Birmingham, J.L. Chesnut, Jr., Selma.

VI. Sumter County

Sumter County is located in the west-central part of the state, bordering Mississippi to the west and the Tombigbee River to the east. The county seat is Livingston. Other towns include York, Cuba and Bellamy. The county's population is 16,420 and rapidly declining; 39% of its residents live below the poverty level.

Sumter, Greene and Marengo Counties constitute the Seventeenth Judicial Circuit of Alabama. Judge Eddie Hardaway, the Circuit's lone judge, lives and has his principal office in Sumter County.

A. Summary

In 1995 there 104 civil actions filed in Sumter County. None were class actions. In 1996 there were 148 civil actions filed, of which 15 were class actions. In 1997, there were 161 civil actions. Eight were class actions.

Nine of these 23 class actions were conditionally certified *ex parte*. There do not appear to have been any certifications after notice and hearing. Seven of these 23 actions involve nationwide classes. Many others may be assumed to involve multistate classes since they define the class in terms of transactions with the defendant company. One action was expressly brought on behalf of Alabama and Mississippi residents.

B. 1996 class action filings

96-1. Jones vs. Interstate Ford, Inc. et al., CV-96-15, 1/26/96. Breach of contract, fraud, conspiracy. Named plaintiff, Alabama resident, on behalf of a class of all those who have bought products from Interstate Ford that were financed by Fidelity Financial Services. No motion for class certification on record. Action dismissed without prejudice on 11/20/96 since plaintiff's claims are encompassed by conditionally certified class in Coates vs. Fidelity Financial Services in the Circuit Court of Washington County. Plaintiffs represented by Garve Ivey, Jr., Jasper, AL, and David Cromwell Johnson and Bruce Petway, Birmingham, AL.

96-2. Nobles et al. vs. W.S. Badcock Corp. et al., CV-96-30, 2/27/96. Fraud, breach of contract. Alabama Mini-Code violations. Named plaintiffs, all Alabama residents, on behalf of a class of all persons who entered into transactions in Alabama with defendant and were charged for credit life insurance they had not agreed to buy. No class member has a claim exceeding $49,000. Class conditionally certified, 8/1/96. Order approving settlement and dismissing with prejudice, 11/18/96. Plaintiffs represented by Andrew P. Campbell and Jonathan H. Waller, Birmingham, AL and J.L. Chesnut, Jr., Selma, AL.

96-3. Brewer vs. Campo Electronics et al., CV-96-37, 4/3/96. Declaratory and injunctive relief; restitution. Named plaintiff, an Alabama resident, on behalf of all Alabama residents who purchased service contracts from defendants, who had no certificate of authority from the

Commissioner of Insurance. Class conditionally certified *ex parte* 4/29/96. Notice of removal, 5/28/96. Plaintiffs represented by G. Daniel Evans and Michael J. Evans, Birmingham, AL.

96-4. Cashow vs. Heilig-Meyers, Inc., CV-96-41, 4/12/96. Fraud, Alabama Mini-Code violations; "flipping." Action brought by named plaintiffs, Alabama residents, on behalf of a class of a class of all persons who were forced to refinance one or more loans as a result of defendant's policies. Class conditionally certified *ex parte* 11/26/96. Plaintiffs represented by J.L. Chesnut, Jr., Selma, AL, Andrew P. Campbell, Birmingham, AL, and Robert G. Methvin, Jr., Birmingham, AL.

96-5. Carter vs. Union Security Life, CV-96-42. Fraud, Alabama Mini-Code violations. Action brought by named plaintiff, an Alabama resident, on behalf of a class of all persons who have bought credit life insurance through defendant. Motion for conditional certification, 4/12/96. No certification order on record. Notice of removal filed, 5/23/96. Plaintiffs represented by J.L. Chesnut, Jr., Selma, AL, and Robert G. Methvin, Jr., Birmingham, AL.

96-6. Davis et al. vs. First Family Financial Services, Inc., CV-96-51, 5/24/96. Fraud, breach of contract. Alabama Mini-Code violations, "flipping." Action brought by named Alabama residents on behalf of a class of all Alabama-resident customers of defendant who were required by defendant's policies to have only one loan from defendant. No class member has a claim exceeding $49,000. Motions for class certification filed 5/24/96 and 8/12/96. No hearings on motions. Dismissed without prejudice, on plaintiffs' motion, 9/17/96. Plaintiffs represented by J.L. Chesnut, Jr., Selma, AL, Robert G. Methvin, Jr., Birmingham, AL, Andrew B. Campbell, Birmingham, AL.

96-7. Brown vs. Chrysler Corp. and AlliedSignal Corp., CV-96-56, 6/17/96. Negligence, breach of implied warranty, wilful and wanton misconduct, conspiracy. Named plaintiffs, residents of Alabama, Florida and Michigan, on behalf of a class of all purchasers of Chrysler vehicles manufactured 1988-95 with ABS systems manufactured by AlliedSignal. Class conditionally certified *ex parte* 6/17/96. Notice of removal, 7/26/96. Remand order, 8/13/96. Motion to transfer venue, 12/2/96. Defendants' motion for class decertification, 1/13/98. Plaintiffs represented by J.L. Chesnut, Jr., Selma, AL, Joseph W. Phebus and Nancy J. Glidden, Urbana, IL, D. Michael Campbell, Miami, FL, and John Deakle, Hattiesburg, MS.

96-8. Hand vs. First Alabama Bank et al., CV-96-60, 6/24/96. Alabama Mini-Code violations; money had and received. Action brought by named defendant, an Alabama resident, on behalf of all Alabama residents who prior to 5/20/96 entered into consumer credit contracts with defendants, gave security interests in personal property, and had single-interest insurance force-placed upon them. Class conditionally certified *ex parte*, 6/24/96. Motions to decertify class and transfer venue, 8/13/96. Order transferring to Circuit Court of Marshall County, 9/12/96. Plaintiffs represented by William C. Brewer, III, Livingston, AL.

96-9. Paige et al. vs. First Colonial Insurance Co. et al., CV-96-77, 8/14/97. Fraud, suppression, restitution. Action brought by named plaintiffs, all Alabama residents, on behalf of all Alabama residents who, in connection with credit transactions, were required to purchase property insurance from defendant on principal and interest due rather than on value of collateral.

No motion for class certification. Order transferring to Barbour County pursuant to agreement of parties, 4/1/97. Plaintiffs represented by Charles A. McCallum, III, Birmingham, AL, and J.L. Chesnut, Jr., Selma, AL.

96-10. Anderson vs. Commercial Credit Corp., CV-96-78, 8/2/96. Fraud, "flipping." Action brought by named Alabama resident on behalf of a class of all Alabama residents who had loans with defendant refinanced or consolidated into subsequent loans by defendant and all Alabama residents who were sold property insurance by defendant with premiums based on total of payments and interest. Motion for class certification, 11/11/96. Motion to compel arbitration, 11/11/96. Order setting 2/4/97 certification hearing, 11/18/96. Order dismissing without prejudice, 2/12/97. Plaintiffs represented by Robert G. Methvin, Jr., Birmingham, AL, Andrew P. Campbell and Charles A. McCallum, III, Birmingham, AL, and J.L. Chesnut, Jr., Selma, AL.

96-11. Biggers vs. ITT Lyndon Property Insurance Co., CV-96-079, 8/2/96. Fraud, Alabama Mini-Code violations, "flipping." Action brought by named Alabama resident on behalf of a class of all customers of defendant who were required by defendant's policies to have only one loan from defendant. No class member has a claim exceeding $49,000. No motion for class certification on record. Notice of removal, 9/6/96. Plaintiffs represented by J.L. Chesnut, Jr., Selma, AL, Robert G. Methvin, Jr., Birmingham, AL, Andrew B. Campbell, Birmingham, AL.

96-12. Gracie Jones vs. United Credit Corp, CV-96-109, 10/7/96. Fraud, Alabama Mini-Code violation ("McCullar violation"). Named plaintiff, Alabama resident, on behalf of all persons who bought credit life insurance from defendants and were charged premiums held unlawful in McCullar vs. Universal Underwriters Life (Ala. 1995). No motion for class certification on record. Plaintiffs represented by D. Bruce Petway, Andrew Campbell and Charles A. McCallum, III, Birmingham, AL.

96-13. Gracie Jones vs. Transamerica Financial Services et al., CV-96-110, 10/10/96. Fraud, suppression. Action brought by named Alabama resident on behalf of a class of "all persons who bought insurance from defendants, named and fictitious, and each of them, and were unlawfully charged premiums for said insurance." No class member has a claim exceeding $49,900. No federal causes of action are asserted. No motion for class certification. Notice of removal 11/15/96. Order of remand and dismissal of class claims without prejudice, 1/30/97. Plaintiffs represented by D. Bruce Petway, Andrew Campbell and Charles A. McCallum, III, Birmingham, AL.

96-14. Gracie Jones vs. Merit Life Insurance Co., CV-96-111, 10/7/96. Fraud, Alabama Mini-Code violation ("McCullar violation"). Named plaintiff, Alabama resident, on behalf of all persons who bought credit life insurance from defendant and were charged premiums held unlawful in McCullar vs. Universal Underwriters Life (Ala. 1995). No motion for class certification on record. Notice of removal on diversity grounds and on ground that the claims alleged are identical to those in a putative class action pending in the U.S. District Court for the Northern District of Alabama, Sanford vs. Merit Life, 11/12/96. Plaintiffs represented by D. Bruce Petway, Andrew Campbell and Charles A. McCallum, III, Birmingham, AL.

96-15. Lewis et al. vs. Exxon Corp., CV-96-140. Class action. File unavailable due to

preparation of record on appeal.

C. 1997 class action filings

97-1. Dellaveccia et al. vs. Bayer Corporation, CV-97-11, 2/23/97. False and misleading advertising; fraudulent misrepresentation; violation of Pennsylvania Unfair Trade Practices and Consumer Protection Law. Three named plaintiffs, two Alabama residents and one Pennsylvania resident, representing a nationwide class of persons harmed by Bayer's advertising representations that Genuine Bayer Aspirin is superior to generic aspirin. Motion for immediate certification filed with Complaint. Class conditionally certified 3/4/97. Plaintiffs represented by J.L. Chestnut, Jr., Selma, AL, Joseph W. Phebus, Urbana, IL, D. Michael Campbell,, Miami, FL, John Deakle, Hattiesburg, MS, Joseph Carey and Joseph Danis, St. Louis, MO, David Danis, St. Louis, MO.

97-2. Collier vs. Magnolia Federal Bank for Savings et al., CV-97-13, 2/24/97. Fraud; malicious negligence. Named plaintiff, an Alabama resident, on behalf of a class of all those who have paid for insurance, on mobile homes financed by Magnolia, a Mississippi bank, in amounts greater than the depreciated value of the homes. Notice of Removal, 3/17/97. Plaintiff represented by W. Eason Mitchell, Tuscaloosa, AL.

97-3. Luke et al. vs. Colonial Mortgage Co., CV-97-81, 7/2/97. Breach of contract; money had and received. Named plaintiffs, Alabama residents, on behalf of a class of all those who have had residential mortgage loans from defendant and have had to pay fees when lien was released or loan refinanced. Class certified conditionally *ex parte* 7/2/97. Plaintiff represented by Nathan G. Watkins, Jr., Livingston, AL.

97-4 Paige et al. vs. Magnolia Bank for Savings and Magna Mortgage Co., CV-97-106, 8/20/97. Breach of contract; money had and received. Named plaintiffs, Mississippi residents, on behalf of a class of Alabama and Mississippi residents who have had residential mortgage loans from Magnolia, serviced by Magna, and have had to pay fees when lien was released or loan refinanced. No motion for class certification on record. Plaintiff represented by Nathan G. Watkins, Jr., Livingston, AL.

97-5. Nelson et al. vs. Carnival Cruise Lines et al., CV-97-107, 8/21/97. Fraud. Named plaintiffs, Alabama residents, on behalf of a nationwide class of all U.S. residents who were charged "port charges," during the 20 years preceding filing of the complaint, greater than needed to cover actual dockage costs. No claim is made under any federal statute or federal cause of action; no punitive damages are claimed; no class member claims damages that equal or exceed $75,000. Class conditionally certified *ex parte* 8/21/97. Notice of Removal, 9/22/97. Plaintiffs represented by Jere L. Beasley, Montgomery, AL.

97-6. Little et al. vs. American General Finance et al., CV-97-124, 9/12/97. Breach of contract, fraud, suppression, conspiracy. Action by named plaintiffs, Alabama residents, on behalf of a class of all persons who have purchased satellite TV systems financed by American General. Class conditionally certified *ex parte* 10/3/97. Plaintiff's motion for conditional certification expresses concern that defendant will "improvidently remove this case to Federal Court and before such case is remanded, agree to conditional certification in another court, thereby depriving this court of its jurisdiction."

Plaintiffs represented by J.L. Chesnut, Jr., Selma, AL, and Robert G. Methvin, Jr., Birmingham, AL.

97-7. Speight vs. AVCO Money By Mail et al., CV-97-147, 11/7/97. Fraud, suppression, breach of contract, conspiracy. .Named plaintiff, an Alabama resident, on behalf of a class of all those who have purchased household or consumer goods in Alabama that were financed by AVCO. No class member gas a claim greater than $74,000. Motion for conditional class certification, 11/7/97. Notice of Removal, 12/16/97. Remand order of U.S. District Court for want of requisite jurisdictional amount, 1/30/97. Plaintiffs represented by Andrew Campbell and Charles A. McCallum, III, Birmingham, AL, and J.L. Chesnut, Jr., Selma, AL

97-8. Bankhead vs. Household Retail Services, Inc. et al, CV-97-148, 11/7/97. Fraud, suppression, breach of contract, conspiracy. Named plaintiff, an Alabama resident, on behalf of a class of all those who have purchased household or consumer goods in Alabama that were financed by HRS. No class member has a claim greater than $74,000. Motion for conditional class certification, 11/7/97. Notice of Removal, 12/16/97. Plaintiffs represented by Andrew Campbell and Charles A. McCallum, III, Birmingham, AL, and J.L. Chesnut, Jr., Selma, AL.

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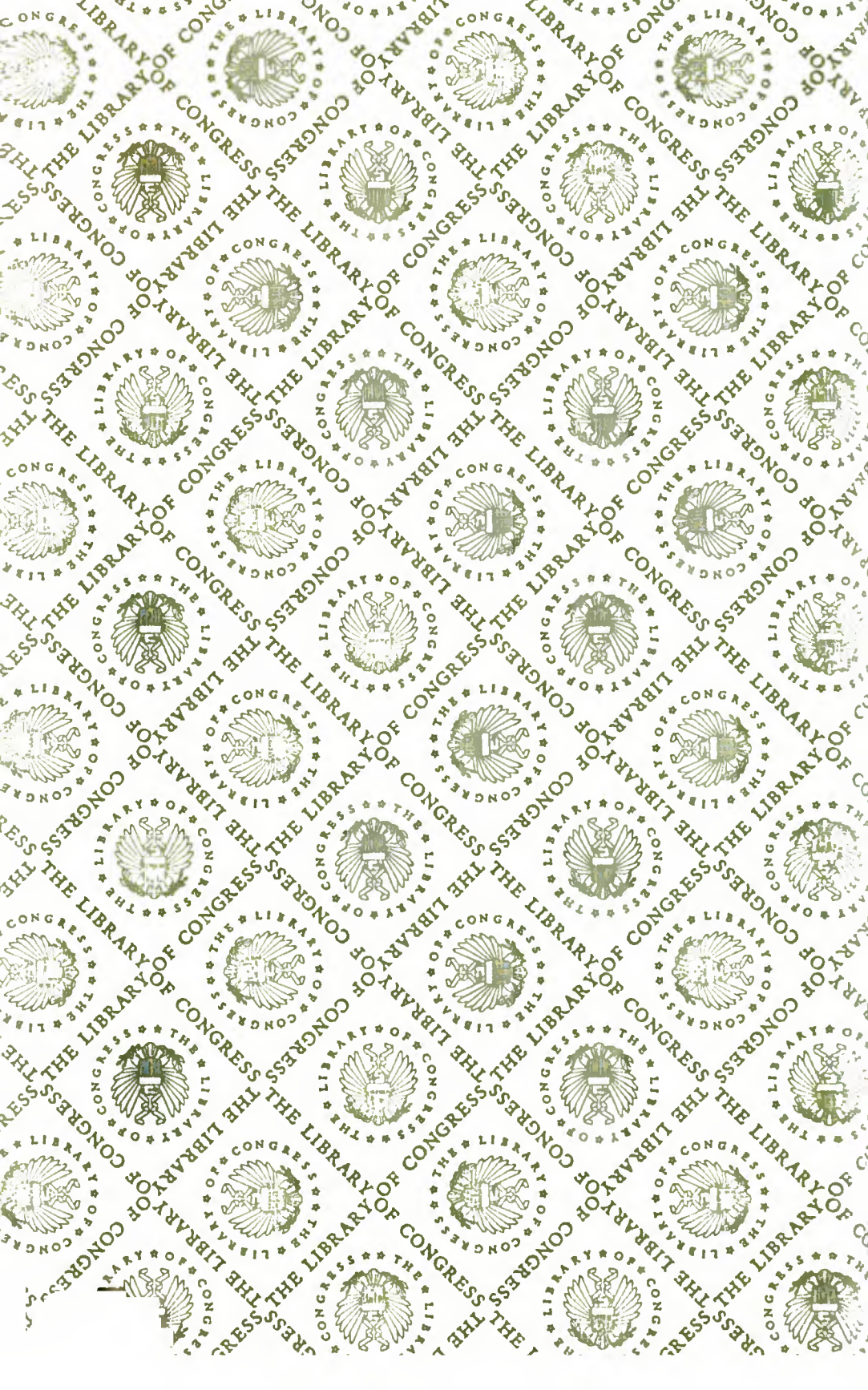
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